

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2035
77-2135

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2035
77-2135

UNITED STATES *ex rel.* LOUIS WOLFISH, et al.,
Petitioners-Appellees,

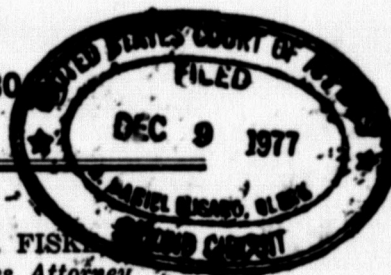
—v.—

HONORABLE EDWARD LEVI, et al.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

Volume VIII (Pages 2801 to 30



LEGAL AID SOCIETY
Criminal Appeals Bureau, FDSU
Attorney for Relators-Appellees
Room 509
United States Courthouse
Foley Square
New York, New York 10007

ROBERT B. FISK
United States Attorney
Attorney for Respondents-
Appellants
One St. Andrew's Plaza
New York, New York 10007

TABLE OF CONTENTS

	PAGE
Docket Entries	A-1
Relators' Notice of Motion for Summary Judgment dated September 16, 1976	A-18
Relators' Statement Pursuant to Rule 9-G of the General Rules of the Southern District of New York	A-45
Respondents' Notice of Motion for Partial Summary Judgment	A-48
Respondents' Rule 9(g) Statement of Facts Concerning Which They Contend There Exists A Genuine Issue	A-49
Respondents' Rule 9(g) Statement of Facts Concerning Which They Contend There Exists No Genuine Issue	A-51
Affidavit of Larry Taylor dated October 19, 1976	A-87
Affidavit of Arthur Cassidy dated October 19, 1976	A-100
Affidavit of Robert Harris dated October 19, 1976	A-102
Affidavit of David Hirsch dated October 18, 1976	A-105
Affidavit of Marshall Haines dated October 19, 1976	A-107
Transcript of Hearing held on November 15, 1976 pp. 1-2	A-111

	PAGE
Letter from Michael Young to Hon. Marvin E. Frankel dated December 20, 1976	A-118
Letter from Assistant United States Attorney Frederick Schaffer to Hon. Marvin E. Frankel dated December 29, 1976	A-116
Affidavit of William Walter Menninger, M.D., dated December 27, 1976	A-117
Affidavit of Larry Taylor dated December 29, 1976	A-124
Affidavit of Larry Taylor dated January 19, 1976	A-128
Affidavit of J. R. Johnson filed on January 26, 1976 (re: visiting hours)	A-153
Supplemental Affidavit of Larry Taylor filed on January 26, 1976 (re: visiting hours) ...	A-156
Order to Show Cause and Affidavit of Michael Young	A-162
Affidavit of Michael Young dated January 23, 1976	A-184
Relators' Order To Show Cause and Temporary Restraining Order returnable September 21, 1976, with accompanying affidavit (re: telephones)	A-191
Order filed September 17, 1976	A-203
Affidavit of Larry Taylor dated September 21, 1976	A-205

	PAGE
Motion to Vacate on behalf of the New York Telephone Company	A-214
Affidavit of Camile G. Blair dated September 21, 1976	A-227
Affidavit of Michael W. Watnick dated September 27, 1976	A-232
Affidavit of Robert Verdeyen dated September 27, 1976	A-236
Affidavit of Louis C. Greco dated September 27, 1976	A-240
Affidavit of Theodore H. West dated September 24, 1976	A-241
Affidavit of Marshall Haimen dated September 27, 1976	A-242
Affidavit of George H. Lovett dated September 29, 1976	A-298
Affidavit of Michael Young dated September 29, 1976	A-303
Supplemental Affidavit of Michael Young dated September 26, 1976	A-305
Order filed October 1, 1976	A-328
Preliminary Injunction filed October 1, 1976 (re: telephones)	A-329
Portions of the transcripts of September 21 and 29, 1976 (re: telephones)	A-334
Memorandum filed April 6, 1977	A-481

	PAGE
Memorandum to Counsel filed April 21, 1977 ..	A-485
Excerpts from Trial Transcript	A-486
Petitioners' Exhibits (partial)	A-1728
Respondents' Exhibits (partial)	A-1934
Affidavit of Marshal Haimes filed June 21, 1977	A-2468
Affidavit of Michael Ciaffa dated May 30, 1977	A-2485
Stipulation of Facts	A-2495
Exhibits to Stipulation of Facts (partial)	A-2563
Petitioners' notice of motion and affidavit to re- open hearing filed on August 31, 1977	A-2687
Memo endorsed on August 31, 1977 denying petitioners' motion to reopen	A-2690
Opinion #46335 filed September 15, 1977	A-2691
Petitioners' Notice of Motion to Reargue	A-2824
Memorandum filed September 29, 1977 denying motion to reargue	A-2825
Proposed Judgment submitted on behalf of the Petitioners	A-2827
Respondents' Memorandum Setting Forth (1) objections to Petitioners' Proposed Judg- ment and (2) Counter proposals for the Judgment	A-2841
Partial Judgment filed October 13, 1977	A-2883

	PAGE
Petitioners' notice of motion for an order altering and amending the judgment entered on October 13, 1977	A-2907
Memorandum filed October 18, 1977	A-2910
Respondents' Notice of Motion and affidavit to amend judgment filed October 21, 1977 ..	A-2910
Respondents' Amended Notice of Appeal	A-2916
Order filed October 26, 1977	A-2918
Affidavit of Phyllis Bamberger filed October 28, 1977	A-2919
Memorandum filed October 28, 1977	A-2920
Order filed November 4, 1977	A-2922
Letter dated October 14, 1977 from Assistant United States Attorney Louis G. Corsi to Hon. Marvin E. Frankel	A-2924
Letter dated October 17, 1977 from Phyllis Bamberger, Esq. to Hon. Marvin E. Frankel ..	A-2926
Court Exhibit 1—Motion for a Protective Order	A-2928
Affidavit of Edward C. Swanson	A-2984
Affidavit of Charles W. Grevious	A-2987
Affidavit of W. Stephen Harmison	A-2989
Affidavit of Larry F. Taylor	A-2991
Affidavit of Elkan Abramowitz	A-2995

	PAGE
Affidavit of Abraham Rivera	A-2997
Affidavit of Jed S. Rakoff	A-2999
Affidavit of Norman A. Carlson	A-3014
Letter from Assistant United States Attorney Louis G. Corsi to Hon. Marvin E. Frankel dated September 9, 1976	A-3016
Letter from Assistant United States Attorney Louis G. Corsi to Michael Young, Esq., dated January 31, 1977	A-3018
Letter from Hon. Marvin E. Frankel to Hon. Robert B. Fiske, Jr., dated January 12, 1977 with two enclosures	A-3022
Letter from Assistant United States Attorney Frederick P. Schaffer to Hon. Marvin E. Frankel dated June 30, 1977	A-3026
Letter from Michael Young to Hon. Marvin E. Frankel dated December 29, 1976	A-3033
Letter from Michael Young to Hon. Marvin E. Frankel dated December 30, 1976	A-3034
Letter from Michael Young to Hon. Marvin E. Frankel dated January 3, 1977	A-3037
Proposed Order Submitted by Counsel for Peti- tioners on January 10, 1977	A-3039
Letter from Assistant United States Attorney Frederick Schaffer to Hon. Marvin E. Frankel dated January 13, 1977	A-3043

	PAGE
Letter from Assistant United States Attorney Frederick Schaffer to Hon. Marvin E. Frankel dated January 14, 1977	A-3050
Letter from Michael Young to Hon. Marvin E. Frankel dated January 17, 1977	A-3052
Order dated January 19, 1977 (Frankel, J.) ..	A-3064

A 2801

We approach, then, in a setting of fluid and sometimes conflicting values, petitioners' contention that correctional officers should be people of the same sex as the inmates in the unit. The position is grounded upon some evidence of affronts to privacy. For the most part, the female petitioners are the main complainants in this aspect of the case. They charge, and the court finds, that male guards have been casual about walking into ^{the} rooms of female prisoners without allowing time for the occupants to arrange to be fully dressed. While the male officers are expected to knock first, and generally do, they have neglected to wait scrupulously for long enough to make the heralding effective.

Nor has this problem been faced only by female inmates. A male inmate testified to a female officer looking in on him while he was on the toilet. And during one of the court's tours, a female guard matter-of-factly led us, without warning the occupants, into a men's washroom and toilet facility. No consternation ensued. It is not possible, at any rate, to find out from a record otherwise bare on this score how common invasions of this type may have been.

There is no evidence at all on the present record of sexual abuse of inmates by correctional personnel. The court cannot proceed in this aspect on rumors or on judicial notice. If we did, we could scarcely emerge from the maze to which the topic leads. After all, the main literature and experience of sexual assaults in prison does not treat of

A 2802

heterosexual misbehavior. Were assault the main concern, having guards and prisoners of the same sex would not solve the problem.

Upon the evidence in this case, and upon the pertinent grounds of judgment and the judicial limitations suggested above, the court deems this a matter for minimal relief. Whatever different views may evolve as matters of social and legislative policy, there are no sufficient grounds for the broad commands petitioners seek. The court will not order the segregation of correctional personnel to match the sexes of the inmates. Neither the evidence nor general facts that might be judicially noticed warrant an order so drastic and confining. See Dothard v. Rawlinson, supra, at ___ n.23; Sex Segregation of American Prisons, 82 Yale L.J. 1229, 1241 (1973).

On the other hand, respondents must ensure more effectively than they have that the elemental requirements of inmates' dignity and privacy are observed. Suitable regulations (and the court's decree) must forbid entry into rooms or bathroom facilities by officers of the opposite sex unless (a) there has been sufficient warning or (b) emergent necessity justifies an exception. Suitable discipline - preferably by respondents, but by the court if necessary - will attend violations of these rules.

While the court should and will order no more at this time, the question must be deemed an open one as facts and attitudes continue to shift over time. If today's very limited directions prove insufficient to assure simple decency, a closer approach to petitioners' view may come to be required.

On this, as on other topics, however, it is to be hoped that flexible adaptations by the people with day-to-day power and responsibility will limit or obviate further interventions by the court.

L. ADMISSIONS AND TRANSFERS

1. Admissions.- All inmates entering or leaving the MCC are processed in the Receiving and Discharge Unit ("R&D"). An inmate first assigned to the institution for confinement has his or her own clothing taken away (a practice to be modified under today's decision) and is given a uniform. The street clothes are kept in R&D and are reissued for visits outside the institution, with the process being reversed on return.

Petitioners complain that the delays upon processing on a first admission to the MCC are excessive, and that this is such a grievous default in the critical time of initial confinement as to require correction by the court. The evidence on this subject is not persuasive that there are delays so unreasonably long as to justify the court's intervention.

2. Court visits.- There are further complaints concerning delays in the short journey required from the MCC to this courthouse as well as other courts in the area for which MCC is a place of confinement. It is obvious that long waits in holding pens and similarly unpleasant places, following premature wake-up times and other oppressions, can interfere

A-2804

A-2804

with an inmate's effective participation in his pending case, and may require judicial correction. Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 663, 688 (S.D. Tex. 1975); Dillard v. Pitchess, 399 F.Supp. 1225, 1237 (C.D. Cal. 1975). In the present record, however, the court finds no credible evidence of undue delays reaching the level of constitutional or other wrongs. It is to be hoped and expected that respondents will make best efforts to see that inmates are brought to and from the court with all convenient speed. Particular judges, in the exercise of general powers of supervision and in the administration of their own cases, may find occasions to issue orders on this subject. The record does not support, however, the issuance of any general form of injunctive relief on this subject.

3. Transfers. When this case began, inmates at the MCC awaiting assignment to more permanent places for the service of their sentences were frequently moved with harsh and inconsiderate abruptness. The practice was to post bus lists for such transfers in the evening preceding an early morning departure. The list was sometimes not posted until after the inmates had been locked into their rooms for the night. In either case, these notifications were so late that it often became impossible for an inmate to notify family, friends, or counsel before precipitate removal to a different institution, often a long distance away.

A 2805

While this practice was not defensible, it failed somehow to be included in the ambitious list of grievances set forth in the original and amended petitions, and it came to be a subject of debate only during the course of the trial. When the undisputed facts were presented, and when the court gave informal intimations of a view adverse to respondents', the latter proceeded to make substantial revisions in their practices. It has now been declared by respondents that notice of a transfer will be given as soon as the designation has been made, and, in all events, at least 24 hours before transfer, except that notice may be withheld from an inmate (a) when there is reasonable cause to believe that it would present a serious threat to the safety and security of the bus or other means of transportation, (b) when population pressures compel a special, unscheduled bus run or other transfer, or (c) in situations where a present or impending emergency requires immediate transfer.

The revised policy seems adequate. Petitioners insist that if the policy is to be accepted at all, it should, nevertheless, be embodied in an injunction because it was not evolved until respondents were under the pressure of this lawsuit. Counterbalancing that contention is the tardiness of the submission of this issue. Balancing these equities, and relying on the good faith of the respondents, the court finds sufficient the rectification they have formulated and will make no further orders on this subject.

A 2806
M. LANGUAGE

Petitioners charge that the MCC fails to provide adequate information and services for inmates who speak no English; the main emphasis is on inmates who speak or read only Spanish. The complaint in this aspect must fail as a matter of fact and law.

The evidence adduced on this subject was meager in the extreme. Supplementing the record made by the parties, the court ordered a survey of the language situation, during the trial, with particular reference to inmates of Hispanic origin. The survey, if not minutely accurate, serves adequately for its purposes. It showed that of the 521 inmates in the MCC at the time, 110 were of Spanish heritage. Of these, 20 spoke no English and 32 read no English. Five of the latter were also illiterate in Spanish.

Although approximately 24% of the MCC staff speaks Spanish, due to staffing patterns and the fact that inmates who do not speak English are not separately classified, non-English speaking inmates may be assigned to units on which none of the staff speaks their native tongue. The MCC handbook, "Guidelines for Inmates at the New York Metropolitan Correctional Center," is translated into Spanish and distributed to Spanish-speaking inmates, as are some Bureau of Prisons Policy Statements. In addition, since the commencement of this action, the institution has obtained the services of an interpreter to translate these Statements.

A 2807

Although bulletin board notices are occasionally posted in Spanish, it is not the institution's policy to translate such notes in all, or even most, instances.

Although precise figures are not available as to how many inmates are bilingual, the record and the court's knowledge support a finding that the number is substantial. At least for those who speak or read only Spanish, a translator is likely to be available almost all the time from among staff or fellow inmates. The situation is not ideal, to be sure. But it is sufficient to withstand the proposals of petitioners for revisions by the court.

Petitioners ask the court to order that all printed information provided by the prison to inmates or their visitors be translated into Spanish; that 15% of the books in the general library be Spanish; that the institution hire a Spanish-speaking law librarian; that a Spanish-speaking staff member be assigned to any living unit housing Spanish-speaking inmates; and that an interpreter be made available to any arriving inmate who speaks neither Spanish nor English within 24 hours of arrival to explain institution regulations. The interpreter would be required to visit the inmate at least every 72 hours and be available as problems arose.

The record provides no basis for any of the relief requested. No witness testified to any instance of prejudice, or even discomfort, because of language barriers. The library

A 2808

list shows a number of titles in Spanish; there is no showing as to why, or for whom, they have been insufficient. There is no evidence that Spanish-speaking staff members are not sufficiently available when it is necessary for staff to communicate with Spanish-speaking inmates. Nor is there any evidence of unmanageable difficulties between inmates for want of sufficient communications.

Without intimating that a filling of these gaps in the record might lead to any different result, the court will dismiss the complaints respecting language problems.

N. GRIEVANCES

Pursuant to Bureau of Prisons Policy Statement No. 2001.6A(10-18-74), the MCC provides procedures for complaints by inmates and responses at ascending levels of the agency. Petitioners assail the prescribed procedures and the practice under them. They seek extensive judicial revisions.

In the first instance, an inmate may present a grievance informally to a member of his unit staff. An informal written complaint, known to all on the inside as a 'cop-out,' may be sent to the appropriate staff officer. Then, there is a formal written complaint (an "Administrative Remedy Form" or "BP-9"), which requires a response from a staff member within 15 working days. The staff member's determination may be appealed, first to the Regional Office of the Bureau of Prisons, which has 20 working

A 2809

days to reply, and then to the General Counsel of the Bureau, who has 30 working days to reply.

In addition to these procedures, since April 1976, each unit in the MCC has had an inmate committee which meets for the purpose of bringing inmate complaints to the attention of the staff.

Petitioners contend that the stated procedures are constitutionally deficient in that there is no set time in which a staff member must respond to a cop-out (or, in fact, any requirement of an answer at all), and the answer need not be in writing. Should an inmate resort to the formal procedures, the entire process, including appeals, ^{may} take 55 working days, or some eleven weeks.

In addition to these difficulties, petitioners note that BP-9 forms are available only from a staff member, who may attempt to discourage the inmate from filing a grievance and propose to solve the problem informally; and it appears that on occasion staff members have in fact refused to give inmates the forms. There are also charges that some staff members have refused to accept BP-9 forms from inmates. Further, a copy of any BP-9 form filed by an inmate is placed in the inmate's central file, and is available to the Parole Commission and other authorities. This, it is argued, will have a chilling effect on inmates' use of the procedure. Petitioners also challenge the efficacy of the inmate committees. They charge, first, that the committee members are not particularly diligent in soliciting inmate expressions,

and, second, that the staff fails to respond to the grievances raised at the meetings.

Building upon the record of expert and other evidence, petitioners seek a substantial catalogue of directives by the court to revise and improve MCC grievance procedures. Specifically, their requests for relief say:

"1. Written grievance procedures

"a. Access to grievance procedure forms should be unrestricted.

"b. All grievance procedure forms describing emergency problems should be answered in writing within 24 hours. All other grievance procedure forms should be answered in writing within three days. All appeals to the regional or national office should be answered in writing within seven days.

"c. No grievance procedure forms or notations as to grievances raised by an inmate should be entered into his central folder or otherwise made available to the parole board or any individual not directly involved in the resolution and response to the grievance.

"2. Elected inmate-staff committees should be established with a right of appeal to an outside individual or group with the power of binding arbitration.

"3. A permanent ombudsman position should be created, with authority to investigate inmate grievances and recommendations, to make suggestions for rule and policy changes, to publicize findings, and to make periodic reports to the Court and/or other interested persons.

"4. Inmates should be advised in advance of all proposed new rules and policies or changes in existing rules or policies and afforded an opportunity to comment on those proposals."

A 2811

If judgments of policy were for the court, we might institute some or all of the changes petitioners demand. But the court is compelled to conclude that there is neither constitutional nor statutory basis for any of these proposals. However desirable, a grievance procedure is not compulsory for prisons any more than it is in public school faculties, the staff of government agencies, or a host of other places where such devices have been installed. In the rapidly developing field of prison law and policy, the usually forward-looking federal establishment may move soon to follow examples petitioners cite. The court lacks power, however, to compel or accelerate movement of that nature.

There are suggestions in the record that the Bureau's own regulations have been disregarded by MCC personnel in the handling of grievances. But the evidence does not establish any pattern or practice of this nature. And there is no specific case now presented for relief on this score. Obviously, today's decision leaves open individual or even class claims that at some future time violations of applicable regulations are resulting in legal injury to the inmates.

In this case, however, the prayers with respect to grievance procedures must and will be denied.

A 2812

O. SANITATION

Under this heading in their lengthy list of complaints, petitioners begin their Post-Trial Memorandum as follows:

"The record establishes that the food storage, kitchen, and housing and housing areas of MCC are, and have been, infested with vermin."⁵⁵

The assertions on this subject go on to charge that the facility is heavily populated with mice, lice, and other non-humans. It is charged that the place is strewn with food and garbage; that cleaning utensils are frequently missing; that there is a constant lack of toilet paper and paper towels; that new inmates are given dirty blankets and mattresses on arrival; that washing machines are constantly in disrepair; and that there are other, similar outrages.

This is one among several subjects upon which petitioners have allowed themselves to be carried away. The court rejects their allegations as substantially without basis in the record. From repeated visits to the MCC and entirely credible testimony, the court finds that the responsible officials in charge and the entire staff of MCC are earnestly and successfully coping with the problems of keeping the institution clean and orderly. It is impossible, as everyone knows, to walk through a public building so densely populated without finding some litter and some objects where they do not belong. On the whole, however, it is clear that the

A 2813

MCC has a highly satisfactory program for maintaining cleanliness and good order, employing both the energies of paid staff and inmates to this vital end.

In sum, without tarrying further over the details, the complaints about sanitation will be dismissed in their entirety.⁵⁶

P. VENTILATION AND TEMPERATURE

Since the MCC opened, there have been significant difficulties with the environmental control system. There is no dispute as to this. It is also undisputed that respondents have sought, and expended substantial amounts of federal funds, to remedy the problems. The system now appears to be operating in a reasonably satisfactory fashion.

Petitioners would have the respondents hire a contractor to inspect and make recommendations concerning the system. The court is not called upon to say whether this is a good idea. Suffice it to say there is no ground for ordering such action.

A 2814

Q. FURLOUGHS AND JOB INTERVIEWS

Under this heading petitioners complain of practices and omissions which are clearly within the sound discretion of respondent officials.

It is urged that prisoners here on writs, who might have been eligible for furloughs under the standards of the prisons whence they came, are not suitably classified so that they may have furloughs here. But furloughs are surely among the subjects most broadly confided to the judgments of prison officials. Furloughs for writ prisoners, brought here for special and limited purposes, would appear to present particular difficulties and anomalies. The short of the matter is that petitioners have adduced no significant evidence on this subject and have shown no legal basis for any relief.

Equally unsubstantial is the complaint about MCC's reservation and occasional exercise of the power to verify with a prospective employer the fact that a job interview has been scheduled for an inmate seeking a furlough for that purpose. Petitioners are correct, of course, in asserting that prospective employers may have their interest chilled by confirmatory calls of this nature. The record reveals, however, and the court's experience with this subject reflects, that the prison, parole, and probation personnel, habituated to collaborative efforts on this delicate problem, proceed with a good measure of care and circumspection. The residual power to make a direct check with the employer is a valid incident to respondents' duties. There is no justification for the proposed intrusion by the court.

A 2815

R. MEDICAL CARE - AN UNRESOLVED ISSUE

Despite the length of this decision and the large number of subjects covered, the case is incomplete in one respect. Petitioners have urged that medical care at the MCC is seriously inadequate. With the concurrence and cooperation of both sides, a medical panel was appointed to study this situation. The panel report was received later than had been expected - or, at least, hoped. Thereafter, unsuccessful efforts were made to resolve the medical issues by agreement. For these and other reasons, the record is incomplete on these issues. It has been agreed and arranged that the gap will be filled in an evidentiary hearing before a Magistrate, sitting as special master.⁵⁷

In the meantime, the case has been pending for a long time, all questions other than those concerning medical care are ripe now for decision at this level, and there is a substantial likelihood that one or both sides will wish to appeal the many rulings now ready for review. There is no just reason to delay further either the entry of a final decree here or the beginning of appellate efforts.

Accordingly, counsel for petitioners will serve and file a proposed form of final decree. Respondents will serve and file objections to the proposed form and counterproposals to substitute for the portions deemed objectionable. These submissions and the court's final decree will be completed with all reasonable speed.

Dated, New York, New York
September 15, 1977

MARVIN E. FRANKEL

U.S.D.J.

FOOTNOTES:

A 2816

1. The propriety of continuing the case as a class action was confirmed by an order dated December 23, 1975, in which the class was defined as "all persons detained in the Metropolitan Correctional Facility."
2. American jails, which characteristically, if ironically, house minor offenders and presumptively innocent people awaiting trial under conditions far more wretched than those of the prisons, have generated shelves of depressing literature. See, e.g., K. Menninger, The Crime of Punishment (1966); B. Bagdikian, The Shame of the Prisons (1972); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D.Mass. 1971), aff'd, 494 F.2d 1196 (1st Cir.), cert denied sub nom. Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974); Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y.), aff'd, 507 F.2d 333 (2d Cir. 1974).
3. The two exceptions are an honor unit, the only one on the second floor, and Unit on the third floor. The honor unit houses the "cadre," sentenced inmates serving their terms at the MCC, who work throughout the institution and are rarely locked into their rooms. These inmates are housed in rooms originally intended as part of the infirmary. Unit 3 is the protective custody unit.
4. The word "design" is - or is readily capable of being made - ambiguous. As used herein, it means "intended" by the planners of the structure, not merely as an abstract idea, but in terms of concrete effectuation (and, often, public assurances to other agencies or branches of government). Thus, a room planned for single occupancy was built (and equipped) with a single bed, storage and movement space suitable for one, lighting and ventilating equipment similarly arranged, etc. See 428 F.Supp. at 335-340, where the conversion of these single rooms to doubles was held by this court to have been unlawful.
5. As a result of an escape attempt, bars have been placed on some of the windows, and steel sheathing has been placed on the inside of certain rooms with exterior walls.
6. "The Crime of Imprisonment," preface to S.&B. Webb, English Prisons under Local Government (1922), quoted in Note, Beyond the Ken of the Courts, 72 Yale L. J. 506, 558 (1963).

A 2817

7. See Singer, Prisoners as Wards of the Courts - A Nonconstitutional Path to Assure Correctional Reform by the Courts, 41 U. Cinn. L. Rev. 769 (1972).
8. This may be one of several subjects on which we could learn from foreign counterparts. Judges in France, West Germany, and Italy, perhaps elsewhere, are charged with supervision over conditions of confinement, claims of maltreatment, aspects of parole, and related matters of penal administration.
9. See Comment, A Statutory Right to Treatment for Prisoners, 50 Nebraska L. Rev. 543 (1971).
10. Cf. Paulsen, State Constitutions, State Courts, and First Amendment Freedoms, 4 Vanderbilt L. Rev. 620 (1951).
11. Cf. Spaeth, The Court's Responsibility for Prison Reform, 16 Villanova L. Rev. 1031, 1041-46 (1971).
12. See generally, Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).
13. But see Linde, Due Process in Lawmaking, 55 Nebraska L. Rev. 197, 225-235 (1976).
14. Respondents' Post-Trial Memorandum 56.
15. Petitioners demand that they be placed in dormitories only with their consent. In view of the ruling now on classification and the determination below as to length of stay, the court denies this further form of proposed relief. There is no need to decide whether a total prohibition against dormitory living might in some circumstances be required.
16. These figures (rounded off) are taken from a survey done by respondents. Petitioners argue that it underrepresents the number of inmates who stay for long periods of time. Petitioners would also add successive sojourns at the MCC to determine an inmate's length of stay. In view of the court's ruling, it is unnecessary to resolve the argument in precise detail.
17. There is a stipulation, with some evident inaccuracies, as to what the library now contains. Without reproducing that list, the court will require respondents' report of compliance to contain a re-checked and accurate account of what is now on hand plus volumes to be added. As to the latter, in addition to the books now in the library, the decree will require that the Federal 2d and Federal Supplement series be extended back to 1950; that missing volumes in the several series now stocked be replaced; that the Modern

Federal Practice Digest be completed and the Federal Practice Digest Second be added. Petitioners would add, inter alia, various items of state law. In New York City, respondents should be able to satisfy this demand by including in their compliance proposals some lending arrangements with nearby libraries or some means of giving inmates access to those libraries.

18. Petitioners' Post-Trial Memorandum 341.

19. Respondents' Memorandum 101-102:

"[E]nforcement of a 'rated capacity' rule as petitioners suggest can only discourage planners from experimenting or providing additional amenities in terms of the physical environment and the amount of space as has been done at the MCC. To the contrary, it will encourage planners to moderate, and indeed, to gear their designs to providing only the absolute minimum amount of space (or initially rating their facilities at such a minimum) in order to establish the highest possible capacity for fear that in a future emergency situation of a rising population the courts would not permit an upward adjustment of capacity even within the limits of generally accepted square footage requirements. Such a development would be unfortunate, indeed."

20. See United Nations Document A/CONF.56/6, "The Treatment of Offenders, in Custody or in the Community, with Special Reference to the Implementation of the Standard Minimum Rules for the Treatment of Prisoners Adopted by the United Nations," Annex II (working paper prepared by the Secretariat for the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1975). The cited document reflects the leadership role of the United States in numbers of people incarcerated as a proportion of the population. See, also, U.S. Prison Population Sets Another Record, 3 Corrections Magazine 3 (March 1977).

21. Petitioners claim the number should be nine. They rely upon an early sketch, changed as the plans progressed. The evidence sustains the view of respondents that the matured plan contemplated 10.

22. Each dormitory has a common bathroom with two sinks, one urinal, one toilet bowl, and one shower. It has been suggested in our record that this might do for as many as 15 men. Accepting that stinting estimate, we might order the dormitories reduced to no more than 15 occupants if toilet facilities were the only problem. But the cumulation of difficulties from packing 120 men into facilities for 60, and the overall absence of any suggestion of a viable number in between, leads ultimately to a ruling for the original design, and not more.
23. Petitioners have sought a determination that dormitories may not be employed at all, that each inmate must have a separate room unless he or she consents to dormitory living. While that is by no means an extravagant proposal, according as it does with standards widely supported, American Bar Association, Tentative Draft of Standards Relating to the Legal Status of Prisoners §6.12(b) and Commentary, 14 Am. Crim. Law Rev. 559-61 (1977) (hereinafter "ABA Standards"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections §2.5(1) (1973), the court is not persuaded that it may be ordered as a matter of either constitutional or statutory right. There is tension, to be sure, in shared sleeping quarters. There are some obvious dangers of assault and other injuries even if the record before us lacks specific illustrations. But the problems seem manageable enough to leave the choice within the judgment of respondents. Perhaps we shall evolve to the higher minimum petitioners urge. At the moment, we are too close to wars and barracks, and too aware of slum housing visible from this courthouse, to hold that dormitories are per se forbidden. Cf. R. Titmuss, Essays on the 'Welfare State' 85-87 (2d ed. 1963). The separate, narrower question of classifying inmates so that dangerous men are not placed in dormitories has been dealt with above.
24. Again, the factors might not singly condemn the arrangement. The court has ruled, for example, that the noise level is not in itself beyond limits we might order. It remains higher and more unpleasant than it would be had the plans been followed, and it adds to the totality of factors leading to condemnation of respondents' departure.
25. The American Correctional Association sets the standard at 75 feet. Ambrose v. Malcolm, 414 F.Supp. 485, 489, 492-493 (S.D.N.Y. 1976). Some decisions have accepted less. Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1975) (60 square feet); Gates v. Collier 423 F. Supp. 732, 743 (N.D. Miss. 1976) (50 square feet).

26. Respondent Warden recounted that shortly after opening the MCC, overflow inmates were housed in an area intended to be a magistrate's courtroom on the third floor. Originally this was limited to inmates stopping over en route between other institutions and "weekenders," but as pre-trial and sentenced inmates began to be assigned to the temporary dormitory, its use was discontinued to avoid the temptation to use the room as a permanent housing facility. The area is currently used as a staff lounge.
 27. The Government's expert, George Camp, First Deputy Commissioner of New York State Division of Criminal Justice Services, testified that common areas "should not be used on a regular basis" as sleeping quarters. It reflects no lack of deference to observe that expert opinion may not have been necessary to make the point. The grave discomforts, for those assigned to sleep this way and for everyone else, could have been predicted. The record of this case fulfills the prediction.
 28. Respondents' Post-Trial Memorandum 127.
 29. Id. 132.
 30. See G. Sykes, The Society of Captives 19-21 (1958).
 31. Respondents' Post-Trial Memorandum 118.
 32. Id., 135.
 33. 42 Fed. Reg. 26,333, 26,336 (May 23, 1977) (to be codified in 28 CFR §540.11).
 34. Respondents' Post Trial Memorandum 185.
 35. The decided cases cover a range that does not amount yet to a settled or definitive jurisprudence. In conditions of high security risk, in cases distinguishable from ours, searches of the kind in question have been allowed. Daughtery v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973); Hodges v. Klein, 412 F. Supp. 896 (D.N.J. 1976); Giampetruzzi v. Malcolm, 406 F. Supp. 836 (S.D.N.Y. 1975); Penn El v. Riddle, 399 F.Supp. 1059 (E.D. Va. 1975); Gettleman v. Werner, 377 F.Supp. 445 (W.D. Pa. 1974); Bijeol v. Benson, 404 F. Supp. 595 (S.D. Ind. 1975).
- A recent decision of an eminent colleague in the Northern District of New York goes farther in outlawing the practice than this court will in this case. Frazier

Footnote 35 cont'd

v. Ward, 426 F. Supp. 1354, 1366 (1977). The court in Frazier held anal searches to violate both the Fourth and the Eighth Amendments as applied to the States by the Fourteenth. Other authorities arrayed against "the indignities of a rectal search," Sostre v. Preiser, 519 F.2d 763, 764 (2d Cir. 1975), in at least some circumstances include Hodges v. Klein, *supra*, at 903; United States ex rel. Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974); and ABA Standards §6.6(f)(iii).

36. Respondents point to testimony that an officer once intercepted a package of marijuana being thrown by one inmate to another when he observed the search team approaching the unit. This is beside the point, of course; the alleged incident was not prevented by the procedure here in question, and there is no basis for finding that recurrences would become more probable if inmates could observe after the search party arrived and went to work.
37. The inmates in the cited case were pre-trial detainees specially classified as "security risks." In that respect, the petitioners herein have a stronger claim.
38. See G. Sykes, The Society of Captives 67-70 (1958); E. Goffman, Asylums 20 (1961).
39. Property, except for currency, which is seized as contraband is generally supposed to be turned over to the Chief Correctional Officer and destroyed under his supervision. On occasion, seized property is returned to an inmate's family or turned over to appropriate law enforcement officials. Currency seized by the respondents is supposed to be deposited in a Miscellaneous Fund maintained by the Department of the Treasury, and is not returned to the inmate from whom it was taken.
40. The quotation is from the Bureau's Custodial Manual, Policy Statement 2001.1B, §702, which reads more fully as follows:
 - "1. Contraband may best be defined as any item or article inside an institution that was not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an appropriate staff member. Authorized items may be considered contraband when found in excess quantities, or altered from original status.

- "2. The following items shall always be considered contraband, within any federal penal or correctional institutions:
 - "a. Guns and firearms of any type.
 - "b. Ammunition, explosives.
 - "c. Knives and tools not provided [according to regulations].
 - "d. Hazardous and poisonous chemicals and gases.
 - "e. Narcotics and drugs. These can be dispensed and in the possession of offenders only as authorized by the institution medical department.
 - "f. Intoxicants, such as liquor and alcoholic beverages.
 - "g. Currency, where prohibited."

- 41. Respondents' Post-Trial Memorandum 216.
- 42. Id. 211-212.
- 43. Id. 212.
- 44. Commissary arrangements present issues of their own, considered and decided below.
- 45. See, e.g., A. Solzhenitsyn, One Day in the Life of Ivan Denisovich (1963).
- 46. Petitioners' Post-Trial Memorandum 374.
- 47. Respondents' Post-Trial Memorandum 212.
- 48. Id. footnote **.
- 49. "Disciplinary Segregation" is
 - "the status of confinement of an inmate housed in an individual cell, either by himself or with other inmates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited

act. Inmates in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention * * *." ¶11b.

50. As quoted earlier, ¶11(a)(3) is also qualified in stating that equal privileges are to be afforded "[t]o the extent possible * * * [and] as is consistent with existing resources available and the security needs of the unit." For purposes of the court's decree, limitations to be imposed under this language will be treated along with "compelling reasons;" that is, they will be given to the inmate in writing.
51. The inmates of the honor unit are the cadre who work throughout the building. There is one guard on duty in this unit during the day shift only. Unit 3, protective custody, has one guard on duty 24 hours a day.
52. Respondents' Post-Trial Memorandum 265.
53. Petitioners' Post-Trial Memorandum 426.
54. Id. 445.
55. Id. 171.
56. In the multicentricity of our headings and subheadings, the divisions of substantive topics may sometimes be arbitrary and capricious. Under another heading, "Food," the court is ordering measures relating to "Sanitation" - namely, the wearing of gloves and headgear by persons handling food.
57. In visits to the MCC, the court toured and considered the medical and dental facilities, receiving some pertinent information from professional and other personnel. The enlightenment thus acquired may serve, of course, to supplement the Magistrate's report.

33

A 2824

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI;
NORMAN A. CARLSON, Director,
United States Bureau of Prisons;
LARRY TAYLOR, Warden, Metropolitan
Correctional Center, et al.,

Respondents.



NOTICE OF MOTION
FOR REARGUMENT

75 Civ. 6000 MEP

S I R S :

PLEASE TAKE NOTICE that, pursuant to the accompanying memorandum of law, petitioners will move this Court on October 4, 1977, for reargument.

Yours, etc.,

WILLIAM E. HELLERSTEIN,
PHYLIS SKLOOT BAMBERGER,
Attorneys for Petitioners

By: Phyllis Skloot Bamberger
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

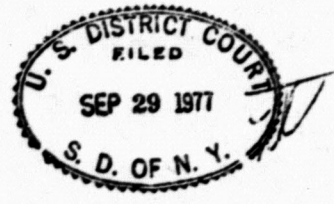
Dated: New York, New York
September 26, 1977

To: The Honorable Robert B. Fiske, Jr.
United States Attorney
Southern District of New York

Attention: Louis G. Corsi, Esq.
Assistant United States Attorney

(34)

A 2825



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

75 Civ. 6000

Petitioners,

-against-

ORDER

EDWARD LEVI, et al.,

Respondents.

-----x
FRANKEL, D.J.

Petitioners have filed a motion for reargument addressed to the portion of the court's decision giving inmates an option to be transferred after 60 days of confinement at the MCC.

Upon the record of evidence, which was not absolutely clear in this respect, and upon the court's own acquaintance with the facts, it was assumed that this provision for choice would have practical significance primarily for sentenced prisoners. Especially as the Speedy Trial Act moves into its ultimate time limitations - and even now under the general practices of this court - it was thought that the cases of pre-trial detainees held for 60 days would not be numerous. Moreover, the court assumed that the oppressive circumstances of confinement to the limits of the modular unit would have relatively attenuated impact for the detainee awaiting trial and being tried, since

SEP 29 1977

A 2826

the sojourn of such a person is frequently interrupted by trips to court and visits with attorneys.

Proceeding on different assumptions, the motion for reargument focuses almost entirely on the supposed dilemmas of the pre-trial detainee confronted with an option of transfer after 60 days. The memorandum supporting the motion necessarily proceeds on speculation in developing its concerns. Admittedly, the court has also been required to engage in some speculation, having in mind the limitations of our record and the limitations of the adjudicative process in any single case, however swollen and extended the case may be. The court concludes that there is no sound reason for pursuing these speculations as a basis for amending the decree at this time. The decree to be entered will issue from a court of equity and will have the flexibility inherent in such pronouncements. There is open the possibility of future amendments on the basis of concrete information. The court concludes that enough has been decided for the time being without anticipation of uncertain possibilities and the borrowing of future troubles along the lines of petitioners' suggestions.

The motion is denied. So ordered.

Dated: New York, New York
September 28, 1977

Martin E. Frankel
U. S. D. J.

A 2827

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI;
NORMAN A. CARLSON, Director,
United States Bureau of Prisons;
LARRY TAYLOR, Warden, Metropolitan
Correctional Center, et al.,

Respondents.

Rec'd LGC
6:10 PM
9/28/77

PROPOSED ORDER
(Legal Aid)
75 Civ. 6000 MEF

FRANKEL, D.J.:

The petitioner class which, by order of this Court dated December 23, 1975, consists of all persons who are or will be confined in the Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York, having moved this Court for partial summary judgment; and the Court having ordered summary judgment with respect to double-celling; receipt of books, periodicals, and other materials; receipts for the seizure of inmate possessions; and mail; and the Court's having heard testimony and received other evidence as to other issues in the case; and the Court's having considered the affidavits, transcripts, exhibits, and memoranda, and having toured the facility; and having considered all papers and proceedings herein; and the Court's having issued an opinion on September 15, 1977, it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them, be, and they hereby are, enjoined from confining any member of the petitioner class at MCC except under the following conditions:

1. Within 90 days of this order, respondents shall submit a reasonable system of classification to determine the degree of confinement required for individual inmates. Said system shall

become effective immediately upon approval by the Court.

(a) The classification system shall separate pre-trial detainees, sentenced inmates, and writ prisoners;

(b) The classification system shall also include a mechanism for separating, classifying, and appropriately housing persons who pose physical dangers or who are thought on plausible grounds to pose risks of violence, or escape, or attempts to escape;

(c) The classification procedure shall specify those locations to which each class of inmates may move from the modular unit, and shall specify whether such movement is to be by group, by pass, by officer escort, or by any other means;

(d) The classification system shall specify the criteria to be used in assigning inmates to the 11-South dormitory unit, including provision to ensure that persons who pose physical dangers or who are thought on plausible grounds to pose risks of violence, shall not be housed in the 11-South unit; and

(e) The classification system shall specify which class of inmates shall reside in each modular unit, and which classes of inmates shall be housed separately from the other classes.

2. No inmate shall be retained at MCC for a period of more than 60 days without his or her consent. As soon as it is known that an inmate's stay will exceed 60 days, and at least one week prior to the expiration of the 60-day period, the inmate shall be informed, by written communication, of his or her right to be transferred to another institution. The inmate shall also be informed of the institution to which the Bureau of Prisons contemplates transferring him. While an inmate may, in writing, waive his right to be transferred from MCC, no final decision to waive or not to waive this right may be required without affording the inmate a reasonable period of time within which to discuss his decision with legal counsel, family, or friends. The waiver form shall therefore inform the inmate of the right to discuss his decision with counsel, family, and

friends. Respondents and their agents shall not employ any coercive device or artifice to encourage or discourage a waiver of the inmate's right to be transferred from MCC. Once an inmate has been transferred from MCC to another institution, he or she may not be returned to MCC without his or her written consent.

3. The practice of providing Muslims pork-free meals by deleting pork from the plate and substituting for it an extra helping of potatoes or other vegetables shall immediately cease. Respondents shall forthwith provide observant Muslims with the same meals as are provided to observant Jews, or shall provide Muslims meals with meats which are substantially identical to those provided observant Jewish inmates. In the event respondents elect not to provide Muslim inmates the same meals served to observant Jews, respondents shall inform the Court, within 90 days of the decree, and upon notice to petitioners, of the type of substantially identical meals they intend to provide Muslim inmates and the procedures they intend to employ for providing these meals.

4. Daily access to law library facilities shall be provided to all inmates who are pro se in any criminal or civil proceedings pending in any court or administrative agency, including the United States Parole Commission or the United States Bureau of Prisons, for the purpose of preparing the documents by which to commence such proceedings, even if the court or agency has the discretion to appoint counsel once the action has begun (18 U.S.C. §3006(A)(j)), and whether or not the inmates are represented by counsel in another proceeding.

The present law library facilities at MCC being inadequate in space and materials, respondents shall, within 90 days of the issuance of this order, and upon notice to petitioners, report to the Court the method they have chosen to remedy these defects, whether by expanding the MCC law library or by providing access to library facilities outside MCC. In the event respondents elect to expand the MCC library, the report shall include an accurate account of the volumes currently contained in the MCC

library and a list of volumes to be added to the collection. The library shall include all the "F.2d" and "F.Supp." back to 1950, and the Modern Federal Practice Digest shall be added. All additions to the library shall be made within 30 days of the Court's approval of the plan. Further, arrangements shall be made for inmate access to state law materials.

5. Respondents shall not prohibit inmates at MCC from acquiring or possessing their own typewriters while they are incarcerated at MCC.

6. Orders for purchases from the MCC commissary shall be taken from inmates and delivered to the commissary at least every other day. Each order shall be promptly filled by the commissary and delivered to the ordering inmate within 24 hours. Order forms shall provide an accurate list of goods available, and shall indicate the brand names of the items and their price, with provision for making second choices among the items available for purchase. No provision of this paragraph shall, however, prevent respondents, if they choose, from providing inmates direct access to the commissary at least every other day.

Respondents shall cease forthwith the practice of endorsing inmates' checks and money orders without the inmate's specific written consent. Respondents may endorse an inmate's check only on specific consent of the inmate after notice that he may refuse to give such consent, or respondents must allow inmates to receive and endorse checks and money orders made payable to them. Respondents shall credit money orders to the payee's account within one day of receipt, and shall credit checks to the payee's account within 15 days, unless there is good cause communicated to the inmate in writing, why a period of more than 15 days is required to credit the check to his account.

7. Respondents are hereby enjoined from housing more than 10 inmates in each of the six dormitory rooms at MCC, or more than 60 inmates in the 11-South dormitory unit.

8. Respondents shall cease housing inmates in beds placed in corridors, on balconies, or in common areas. Inmates shall be housed only in rooms originally designed for such purposes. The inmate population at MCC shall not be permitted to increase

A 2831

to more than 449 inmates, to be allocated among the units as follows:

2 Hospital Not more than 29 inmates
3rd Floor Not more than 24 inmates
5-N Not more than 48 inmates
5-S Not more than 48 inmates
7-N Not more than 48 inmates
7-S Not more than 48 inmates
9-N Not more than 48 inmates
9-S Not more than 48 inmates
11-N Not more than 48 inmates
11-S Not more than 60 inmates

9. Respondents shall not impair or diminish the visiting hours currently in existence. These hours include, but are not limited to, the following:

Tuesday-Friday 12:30 p.m. - 4:00 p.m.
 and 5:30 p.m. - 7:30 p.m.

for all units

Saturday and Sunday 8:30 a.m.-12:00 noon
 and 12:30 p.m. - 4:00 p.m.

for the dormitory units.

 8:30 a.m.-12:00 noon
 or 12:30 p.m. - 4:00 p.m.

for other units

When Monday is a legal Government holiday, the Sunday visiting schedule shall prevail.

Each inmate shall be entitled to receive three visits per week. The maximum visiting time per visit shall be the entire visiting period. In the event of overcrowding (more than 25 persons in any visiting room), the officer on duty in the visiting room may reduce the visiting time allowed, but in no event may the duty officer reduce a visit to less than one hour. Only in the event of extreme overcrowding, and then only when that determination is made by the duty correctional supervisor, may a visit be shorter than one hour. In the event of such "extreme overcrowding," visiting hours may be extended.

Visits are limited to three persons visiting one inmate at a single time. An inmate's children under the age of 16 are not included in this three-person limit. If additional family members are present, the visit should be divided into two groups, each group visiting for half the allotted visiting period. Each visiting period shall be counted as one visit for purposes of calculating the number of visits allowed per week.

In the event respondents elect to continue using an "approved" visitors list, each inmate shall be permitted to identify six friends or relatives for his "approved" visitors list. Children under the age of 16 are not to be counted in the limitation of six visitors. Inmates shall be permitted regular opportunities to change the names of visitors on their "approved" list.

Respondents shall also continue to authorize special visits under circumstances authorized prior to this order.

10. Respondents shall not permit any deterioration or reduction in the visiting schedule, procedures, or facilities extant except after notice to the Court and petitioners upon a showing of good cause for such action. Any such diminution of visiting services or facilities shall not be made less than 30 days after such notice to the Court and petitioners, and only after approval by the Court.

The visiting room toilets shall be kept open for use by visitors and inmates during visiting hours, and shall be locked only by the person occupying the toilet.

Visitors shall be permitted to "check in" in the MCC lobby prior to visiting hours.

Lockers shall be made available for visitors' personal belongings.

The institution shall assign two guards to the lobby during visiting hours for purposes of processing visitors.

11. Respondents shall not impair or diminish attorney visiting hours and procedures announced during the hearing in this case. These procedures include, but are not limited to, the following arrangements:

A 2833

(a) Attorney visits shall be permitted from 8:00 a.m. to 8:30 p.m., seven days per week, with no requirement that prior notice of the visit be given;

(b) The attorney conference room on the third floor, consisting of five individual rooms with doors and a large, carpeted common space provided with tables, shall be maintained;

(c) Two processing lines shall be maintained at the lobby visitors' desk, one primarily for attorney visits;

(d) The special filing cabinets shall be maintained;

(e) Respondents shall continue to monitor the attorney conference area to assure that attorneys are given prompt entrance to and exit from the conference area; and

(f) The current system that allows inmates to proceed to the attorney conference area via a pass shall be maintained.

12. Respondents shall permit co-defendants in a case to engage in joint legal visits unless a specific court order is in force directing otherwise.

13. Respondents shall continue to provide the following telephone service for inmates at MCC.

(a) Local calls

The current total of 23 pay telephones shall continue to be "restricted dialing," permitting calls to only the 212 area code. The distribution of these telephones shall remain at least as follows:

<u>Unit</u>	<u>Number of Pay Telephones</u>
Honor Unit	1
Hospital Unit	1
3	2
5-N	2
5-S	2
7-N	2
7-S	2
9-N	2
9-S	2
11-N	3
11-S	4

A 2834

These telephones shall continue to be available for inmate use from 6:30 a.m. to 11:00 p.m., except during counts.

(b) Long-distance calls

(1) Respondents shall continue to operate 22 long-distance telephones on an 11 trunkline system, to be routed through the MCC switchboard. These long-distance telephones shall continue to be distributed as follows:

<u>Unit</u>	<u>Number of Long-Distance Telephones</u>
3	2
5-N	2
5-S	2
7-N	2
7-S	2
9-N	2
9-S	2
11-N	2
11-S	4

(2) Inmates shall continue to be permitted to make (i) collect calls without following the procedures hereinafter described in subparagraphs (a) through (f); and (ii) calls charged to their commissary accounts in the manner hereinafter described in subparagraphs (a) through (f) through the MCC long-distance switchboard. Advance written authorization by the inmate shall be required for each call an inmate wishes to charge to his commissary account. Such a commissary charge shall be made in the following manner:

(a) An inmate must convey a written authorization for each commissary charge call, including the telephone number to be called, to the MCC commissary, by presenting such authorization to a designated housing unit officer. A separate authorization must be submitted for each such call;

(b) If the inmate's commissary account has a balance of at least \$10 and the requested charge call is within the continental United States, the written authorization for

A 2835

a commissary charge call must be presented to the designated housing unit officer at least four hours prior to the time the inmate wishes to place the call, and upon its approval by the MCC commissary, the said authorization shall be delivered to the long-distance operator;

(c) An inmate whose commissary account reflects a balance of less than \$10 or who wishes to charge a call to a destination outside the continental United States shall present the required authorization to the designated housing unit officer at least 24 hours in advance of the time the inmate wishes to place the call so that MCC officials may confirm in advance that the inmate's account reflects sufficient funds to pay for the cost of the call;

(d) At the time an inmate wishes to make a commissary charge call for which he has previously submitted written authorization as provided in (2)(a) through (2)(c), said inmate shall, using the long-distance telephone in his housing unit, (i) identify himself to the long-distance operator, and (ii) state the call he wishes to charge to his commissary account. The operator, upon determining that the inmate has provided the appropriate written authorization and that the MCC commissary has approved said call, shall place the call;

(e) Inmates shall be provided a written receipt for each commissary charge call made; and

(f) If an inmate's commissary account contains insufficient funds to meet the requirements of (2)(b) or (2)(c), above, the long-distance operator shall not place the requested commissary charge call.

(c) Miscellaneous provisions for long-distance calls

(1) All long-distance calls shall be limited in length to 10 minutes. This 10-minute period shall commence when the called party answers the telephone.

(2) A sign-up list shall be posted near each long-distance telephone for collect and pre-paid calls in order to encourage orderly and equitable use of the telephones.

(3) Emergency need for a telephone, including instances in which an inmate does not have funds to pay for a needed telephone call, shall be handled on a case-by-case basis, as is the current MCC policy.

(4) Inmates lodged in the hospital unit shall be given access to long-distance telephones on an individual basis.

(5) The long-distance switchboard shall be open eight hours each day, seven days per week, from 1:00 p.m. to 9:00 p.m.

14. Respondents and their employees shall immediately cease opening incoming legal mail except in the presence of the inmate-addressee.

Such legal mail shall include any letter from any of the following persons or institutions, so long as a designation appears on the envelope containing such letter indicating that the sender is from that group of persons or institutions permitted to send such legal mail:

- (a) letters from attorneys;
 - (b) letters from federal courts;
 - (c) letters from state courts;
 - (d) letters from members or committees of Congress;
 - (e) correspondence from embassies and consulates;
 - (f) correspondence from the United States Department of Justice or any of its divisions;
 - (g) correspondence from governors of the States;
 - (h) correspondence from the state attorneys general;
- and
- (i) correspondence from prosecuting attorneys.

15. Respondents shall forward mail received at MCC for an inmate who has been transferred to another institution or who has been released.

16. The visual inspection by respondents or their employees of the genital or anal areas of any inmate is hereby enjoined except under specific and particular demonstration of probable cause to believe that the inmate is concealing contraband in his

genital or anal area. Such probable cause must be recorded in writing, upon sworn statements of first-hand knowledge, with a written record of the reasons, results, and circumstances of each such search. A copy of such written record shall be given to the inmate, and a copy shall be maintained and preserved by the respondents. In the event such examination occurs, it is to be conducted in private and in the presence of only those persons whose presence is essential for reasons of security. No such examination may be accompanied by derogatory or degrading remarks or harrassing conduct.

Upon the conclusion of a contact visit, respondents may require that an inmate remove his outer garments, but not his underwear, and present his arms and open hands for inspection. His outer garments may also be inspected. In the event such examination takes place, it is to be conducted in private, in the presence of only those persons necessary for security, and no such search may be accompanied by derogatory or degrading remarks or harrassing conduct.

17. Those inmates incarcerated at MCC for the purpose of standing trial shall be informed that their rooms are to be searched prior to any search of the room by respondents or their employees or agents. Such inmates shall be permitted to observe such a search of their room.

18. Respondents shall immediately cease their practice of seizing property from inmates without affording inmates an opportunity to contest such a seizure.

Within 90 days of the date of this order, respondents shall serve and file a statement of new procedures, for the approval of the Court, providing for at least the following:

- (a) A statement to the inmate justifying the seizure;
- (b) A notice to the inmate of his right to respond in some reasonably simple and convenient fashion, and to assert grounds, if any, claiming that the seizure was unwarranted;
- (c) Some suitable opportunity to meet and answer evidence thought to warrant confiscation;

not illegal per se to possess for credit to his commissary account or to return to the inmate on release or transfer, or to surrender to a person designated by the inmate for its receipt.

19. Respondents' practice of refusing to permit inmates to receive packages from family and friends is hereby enjoined. Within 90 days of the date of this order, respondents shall file and serve a new set of rules and regulations permitting inmates' receipt of packages. Such a set of rules shall include the specification of the volume and character of the types of packages which may be received.

20. The requirement that any inmates at MCC wear the jumpsuit currently in use at the institution is hereby enjoined.

(a) Pre-trial inmates at MCC shall be permitted to wear their own clothing unless they volunteer to wear uniforms to be issued by MCC as provided in subsection (b).

(b) Uniforms for men shall consist of shirts, trousers, and other conventional items. Uniforms for women shall consist of dresses, blouses with skirts or slacks, or other items of standard apparel.

(c) Sentenced inmates shall be permitted to wear their own clothing, or shall be provided uniforms of the kind prescribed in (b), above.

(d) Any clothing issued by respondents must reasonably fit the wearer.

(e) Inmates shall be permitted to wear their own undergarments or shall be provided new ones.

21. Respondents' practice of permitting inmates at MCC to serve or handle food without hand and head coverings is enjoined forthwith. Within 90 days of the date of this order, respondents shall submit a new statement of regulations that require employees working in food preparation, storage, and service to wear head and hand coverings while handling food. These regulations shall include a statement as to how respondents intend to monitor kitchen and unit personnel to ensure compliance with these regulations; additionally, respondents shall prescribe appropriate disciplinary action to be taken against its employees and agents

A 2839

who fail to monitor or ensure enforcement of these regulations.

22. Inmates housed in administrative detention, whether housed in their modular unit or in the 9-South unit, shall be afforded the same general privileges provided inmates in general population. These privileges include, but are not limited to, the following:

- (a) commissary privileges;
- (b) one hour of outdoor recreation each day;
- (c) at least one hour every day of indoor recreation of the kind available in the modular units;
- (d) participation in sick call and access to the psychiatrist or physician;
- (e) participation in legal and social visits;
- (f) correspondence rights; and
- (g) receipt and possession of personal property.

None of these existing privileges may be denied inmates except upon presentation to the inmate of a written statement of either "compelling reasons to the contrary" or written findings that such privileges are inconsistent "with existing resources available and security needs of the unit." Such a finding shall be made only by the Warden of the institution or by his chief assistant, and shall be supported by the particular facts which require diminution of existing privileges.

23. Respondents are hereby enjoined from the practice of locking inmates of the 5-South Unit (Women's Unit) into rooms without toilet facilities for administrative detention, disciplinary segregation, unit-wide emergencies, or any other reason.

24. Correctional officers are hereby forbidden to enter the rooms or toilets and shower rooms used by inmates of the opposite sex unless

(a) the officer knocks on the door and gives suitable warning to the inmate. When an inmate indicates that he or she is undressed or requires time to answer the door, the officer shall wait two full minutes before entering the room.

(b) "emergent necessity" justifies an immediate entry

A 2840

into the room. In the event such "emergent necessity" exists, an inmate shall, after the fact, be afforded a written statement of the reasons that required such entry.

Within 90 days of the date of this order, respondents shall present to this Court their proposals for providing for disciplinary measures against those correctional officers who violate (a), supra, and for determining the validity of the written reasons provided in (b), supra.

25. The Court's summary judgment order, dated , 1977, is incorporated by reference into this order.

26. In those cases in which respondent must, within 90 days, report a plan or regulations to this Court or prove compliance with this order, such reporting shall include notice to petitioners, and shall provide petitioners a period of 15 days within which to respond to the proposal. Any plan, regulation, or program will take effect immediately upon approval by the Court.

27. Within five days of the signing of this order, and within five days of the signing of any supplemental order or of the Court's approval of any agreement, proposal, plan, or regulation, respondents shall read the order to each of their employees and agents at MCC, with an explanation of the mandatory nature of the order and penalties for disobedience. Within five days of the signing of the order, respondents shall transmit one copy thereof to each inmate at MCC and shall supply one copy of the court order for each inmate arriving at MCC.

Dated: New York, New York
 , 1977

MARVIN E. FRANKEL
United States District Judge

A 2841

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x

UNITED STATES ex rel WOLFISH, :
et al., :
Petitioners, :

-v- : 75 Civ. 6000 (MEF)

EDWARD LEVI, et al., :
Respondents. :

----- -x

RESPONDENTS' MEMORANDUM SETTING FORTH
(1) OBJECTIONS TO PETITIONERS' PROPOSED
JUDGMENT AND (2) COUNTER PROPOSALS FOR
THE JUDGMENT

Preliminary Statement

This memorandum is submitted on behalf of the respondents setting forth their objections to petitioners' proposed judgment and, pursuant to the Court's direction, counter proposals for the judgment; submitted herewith is a form counter judgment ("counter order").

1. Preamble

We have not revised the preamble to petitioners' proposal except in the following respects. The Court noted in its opinion (at 125) that judgment should now be entered, and the appeals process begin even though the medical issues have not been decided. We have therefore included in the preamble the necessary language from Rule 54(b) directing

entry of final judgment on all issues except the medical issues. Consistent with this revision, this order should be entitled "PARTIAL JUDGMENT". We have also revised the preamble to petitioners' proposal to note that certain of their claims had been dismissed on the summary judgment motion and at the close of their direct case.

2. Classification

Respondents urge the Court to substitute paragraph 1 of the counter order for paragraph 1 proposed by petitioners. The counter order provides for the classification and separation of inmates as directed by the Court in its opinion (at 21-22), the details of such a system to be set forth after further study and review.

The Court's opinion was silent as to whether any exceptions to this system would be permitted in special situations. Believing that the system should reasonably permit exceptions in special cases, we have included an outline for such exceptions in paragraph 1(a)(i)-(ii) of the counter order. Those exceptions are based upon the need to maximize the utilization of all available rooms while at the same time providing housing for divergent groups of inmates with ongoing proceedings before the local courts. Thus, for example, if no exception were permitted for women, and a separate pretrial unit and post conviction unit (each consisting of 48 rooms) had to be established for women,

A 2843

at least half of those rooms would probably be vacant at any given time because of the relatively small number of women housed at the MCC. (See Daily Population Logs which are incorporated as Exh. 1-4 to the Stip. of Facts) The same problem of substantial underutilization of rooms would be posed by requiring the establishment of separate pretrial and post conviction units in the hospital and other specialized units described in paragraph 1(a)(1). Thus, without the above-cited exceptions the existing problem of providing housing at the MCC for inmates who are engaged in proceedings before the local courts would likely be exacerbated.

Likewise, we have included a provision which reiterates the duty of the respondents to maintain the separation and classification directed by the Court and yet permits the MCC some limited flexibility to temporarily use all available rooms to house inmates being committed to its custody. (Paragraph 1(a)(ii)) Thus, for example, if no rooms were presently available in a pretrial unit, MCC could temporarily assign a pretrial detainee to a sentenced unit until a room became available in the appropriate unit. We believe that this provision is reasonable and essential to ensuring that all available rooms are utilized should the need arise. Further, we note that a similar provision

A 2844

was approved in the consent decree and partial judgment entered in Marion County Jail Inmates v. Broderick, No. IP 72-C- 424 (S.D. Ind. June 9, 1975), ¶19, p. 4. (A copy of this consent decree has previously been submitted to the Court).*

* We would also note that should an exception arise under paragraph 1(a)(ii) wherein a room was not available in the high security unit and an individual who posed special dangers of violence or escape were admitted to the MCC, he would be assigned temporarily to another unit and, as is the MCC's responsibility in any event, the MCC would take such appropriate additional measures during that interim period to reasonably provide for the safety of the other inmates in the unit and for the security of the institution.

A 2845

In paragraph 1(b) of the counter order we have made clear that convicted individuals at the MCC pursuant to a writ are part of the sentenced population and not pretrial detainees. We see no reason, or directive in the Court's opinion, for requiring as a general matter separation of writ cases from other sentenced inmates; such a further classification category can only make more difficult the problems of separation and efficient utilization of available spaces at the MCC. And, for the reasons set forth in respondents' post-trial memo (pp. 48-49), we do not believe that convicted individuals at MCC on writs of habeas corpus ad prosequendum should be classified as pretrial detainees.

In addition to believing that paragraph 1 of the counter order should be substituted for paragraph 1 proposed by petitioners, we also have specific objections to certain portions of petitioners' proposal. First, as set forth above, we do not believe it is appropriate to create a separate classification for individuals at the MCC on writ as required by paragraph 1(a) of petitioners' proposal. Moreover, such a classification was not required by the Court's opinion.

Second, paragraph 1(c) of petitioners' proposal seeks to embody in the Court's order a requirement for a

pass system. We object to this proposal. The Court directed the respondents to classify and separate inmates based upon legal status and their perceived threat to the security of other inmates or the institution. (Opinion at 19-23) The Court specifically rejected petitioners' request to order further relief and recognized the discretionary authority that respondents had on matters beyond classification and separation:

When the foregoing measures of classification have been instituted, perhaps along with others that respondents are, of course, free to evolve, it should be feasible to relax the existing restrictions on movement within the outer borders (which are highly secure) of the MCC. As has been noted, the court is unable and unwilling to prescribe such further measures of relief at this time. It is to be hoped that respondents will deal creatively and sufficiently with the problem. Opinion at 23 (Emphasis Added).

Further, prior to issuing its decision, the Court denied petitioners' motion dated August 29, 1977 which sought to "constitutionally [require the respondents] to remove some restriction on movement in the institution, at least by use of a pass system." (Bamberger Affidavit dated August 30, 1977, p. 2)

Nonetheless, petitioners are again seeking to require the MCC to implement a pass system under court order. This attempt should again be rejected. The fact that subsequent to completion of the trial, MCC has initiated a pass system -- the ultimate extent and operation still to be determined -- should not, in our view, result in its embodiment in the Court's final judgment. As the Court recognized, this is a matter more appropriately left to the informed discretion and professional judgment of the respondents.

Third, paragraph 1(d) and 1(e) are unnecessary in light of the more general directive that the MCC classify and separate individuals on the basis of legal status and danger. We therefore suggest that they not be included in the final judgment.

3. Length of Confinement at the MCC

We again urge the Court to substitute paragraph 2 of the counter order for paragraph 2 of petitioners' proposal. As a general matter, we believe that the format of the counter order more clearly and specifically sets forth respondents' duties and obligations under the Court's opinion. In addition, we have the following specific objections to petitioners' proposal and suggestions for changes.

First, we believe that respondents should be given a short period (14 days) after entry of the partial judgment within which to implement the 60-day provision, and that the provision should be applicable to inmates at the MCC on that date or subsequent thereto. Petitioners' proposal provides for neither. Such prospective application of the 60-day rule is needed in order for the MCC to develop and implement a reasonable system to monitor and retain data, in a readily accessible form, concerning individual inmate's length of incarceration at the MCC. Moreover, if the previous stays of the thousands of inmates who have been at the MCC during the past two and one half years must be taken into account under this 60-day rule, the MCC would face an enormous administrative task of going through its files to identify each inmate, and determine the length of each period of incarceration at the MCC and the time periods between each period of incarceration. Given the above, we believe that the prospective application of the 60-day rule is reasonable and consistent with the requirements of the Court's opinion.

A 2849

In addition, in paragraphs 2(a) and (b) of the counter order, we have suggested certain clarifications of the 60-day rule. Petitioners' wording suggests that the 60-day rule has unlimited application in terms of how long the 60-day limitation would apply or in accumulating a particular inmate's stays at the MCC. For example, under petitioners' proposal, if an inmate had been incarcerated at MCC for a total of 60-days (whether for 60 consecutive days, or a total of 60 days consisting of a number of shorter stays) at any time from August 1975 to the present, then that inmate could never again be held at the MCC without his consent; likewise, if an inmate were to spend 50 consecutive days at MCC in 1977, were transferred and then returned to MCC in 1979, he could only be held there for 10 days, even though his last period of incarceration at the MCC was more than one year ago. We do not believe that such results (or other variants thereto) were intended by the Court in the application of the 60-day rule. Rather, our review of the Court's opinion leads us to conclude that the Court's concern is with the alleged effect on an inmate of an unbroken period of incarceration at the MCC. In this regard, we note

A 2850

that in rendering its decision, the Court relied upon the respondent's statistics on length of stay at the MCC (Opinion at 24) which do not add together or accumulate multiple periods of incarceration; moreover, the Court's order dated September 28, 1977 denying petitioners' motion to amend also suggests this same concern.

In order to reflect what we perceive as the intent behind the Court's opinion, we have included a "consecutive days" qualification to the 60-day rule. The question, nonetheless, remains what, if anything, must the order direct with respect to the situation posed by the inmate who has not been held at the MCC for 60 consecutive days, but has spent a total of 60-days (non-consecutive) at the MCC within a relatively short period of time. We would urge the Court not to include any specific prohibition on the ability of the respondents to reincarcerate or detain such an inmate at the MCC if his or her presence is needed in a local court. Of course, respondents recognize the duty to comply in good faith with both the spirit as well as the letter of the Court's order. If, however, the Court believes that it is necessary to make a specific ruling on this matter, some system, we believe, must be devised which would conform to the intent of the Court's opinion and also permit reincarceration of such an inmate at MCC, should the need arise, within some reasonable time in the future. The precise details such a proposal we are not at present able to formulate

because of a multitude of differing facts and circumstances that may arise in individual cases. We therefore request, as suggested in the Court's reargument order, that this partial judgment not at this time include further limitations; should petitioners in the future demonstrate a need, upon concrete information, for further restrictions or limitations, then this Court at that time would have the necessary power to act.

We have incorporated the provision contained in the second sentence of petitioners' paragraph 2 into the first sentence of paragraph 2(b) of the counter order. We have also added a sentence in paragraph 2(b) of the counter order that makes it clear that this provision does not give an inmate a right to stay at the MCC.

The third sentence of petitioners' paragraph 2--requiring the MCC to inform the inmate of the institution to which he is to be transferred--should be deleted. As the Court noted in its opinion (at 115), the present MCC policy is to notify an inmate of transfer once the designation has been made, and at least 24 hours in advance of transfer. That practice, which would also be applicable to inmates being transferred pursuant to the 60-day rule, should be sufficient. Moreover, inclusion of petitioners' third sentence implies that notice of the institution to which inmate is going to be transfer must be given a week in advance. As a practical matter, a weeks' notice may not be

A 2852

possible in all cases because of the constantly changing population levels at surrounding local and federal detention facilities and correctional institution which affects the MCC's ability to place inmates in those institutions.

We believe that the fourth, fifth and sixth sentences of petitioners' proposal should be deleted. Specific times for notice to and a decision by the inmate are included in paragraph 2(b) of the counter order. (We believe that such time periods are necessary so that both MCC and the affected inmates will clearly know what is expected of each.) An inmate has ample access to telephones and visits with counsel, family and friends, and they are surely free to consult with them on these matters. We thus see no need to include a consultation provision in the judgment as suggested in the fourth and fifth sentences of petitioners' proposal. Likewise, we do not believe that it is necessary or appropriate to include a provision regarding noncoercion. Paragraph 2(a) specifies that a waiver must be voluntary and respondents recognize their correspondent duties flowing therefrom.

The last sentence of petitioners' proposal should be deleted. As noted above in conjunction with the discussion on petitioners' formulation of the 60-day rule, this proposal would apply restrictions which, in our view, the Court did not intend. We again urge the Court not to include any specific time limitation in this partial judgment.

5. Law Library

We object to the first sentence of petitioners' paragraph 4 except as to those matters which are included in paragraph 4(a) and (c) of the counter order. Although the Court's opinion indicated that inmates should be given access to the law library "each day" (Opinion at 34), it is not clear whether the Court intended seven days per week, or five days per week. We believe that it is consistent with the intent of the Court's opinion, and the more general requirement that inmates be given reasonable access to a law library, that it be limited to five days per week. See Stevenson v. Reed, 391 F. Supp. 1375 (N.D. Miss. 1975). Likewise, the Court's ruling is premised on the right of access to the courts, Opinion at 33, and we therefore believe that the judgment should mandate physical access for pro se inmates in connection with judicial proceedings only. We have further clarified petitioners' proposal to indicate that pro se inmates are entitled to access to the library after commencement of an action and in defense of an action, and that should counsel be appointed, then that inmate could be denied further physical access to the library.

A 2856

delete the phrase that orders must be delivered "within 24 hours" of submission of an order and substitute the formulation that orders be delivered "the following day." This latter formulation provides a little more flexibility and accomplishes the objective set forth in the Court's opinion. Third, the second sentence of petitioners' proposal (except for the "second choice" phrase) goes beyond what the Court's opinion directed and we object to its inclusion.

With respect to endorsing checks, we are not clear as to petitioners' meaning in using the phrase "specific consent" in their proposal. We have attempted to clarify its meaning by deleting the word specific and stating in paragraph 6(d) that after a proper consent has been given, separate written consent for each check is not thereafter required by this provision. The last sentence of petitioners' proposal should also be modified. First, the Court did not direct that money orders be credited within one day; in any event, petitioners' have conceded in their post trial memorandum (p. 359, fn**) that this is already occurring at MCC. We therefore see no need or justification for an order on this issue. Second, we believe that the time period within which the MCC must credit checks should start to

A 2857

run from either the time the MCC endorses a check pursuant to a consent or the time the inmate endorses it and gives it to the appropriate unit officer.*

In addition, we have been advised by the MCC that on two occasions in the past year, checks drawn on banks located outside the continental United States were returned for insufficient funds; the MCC was not notified until 24 and 26 days, respectively, after the checks had been sent through for collection. Because of this, we request that the Court provide a 30 day clearance period for such checks as set forth in the counter order.

7. Capacity of MCC

Respondents request that the Court provide in the judgment that the MCC be given 60 days in which to reduce the dormitory capacity, and 30 days within which to end the practice of temporarily housing inmates in commons areas. The Court previously provided for a comparable period in the double celling order and we believe that the same phased approach is necessary and reasonable here.

* Although we anticipate that as a general matter the difference, if any, in the time will be minimal, we believe it is appropriate to draw this distinction.

A 2858

jw
3599

We would also request that the Court include in the judgment the emergency provision which is contained in paragraph 9(b) of the counter order. We are advised that a substantially similar provision is contained in all the cases involving overcrowding at City facilities. E.g., Detainees of the Brooklyn House of Detention v. Malcolm, 520 F2d 392, 394 (2d Cir. 1975); Benjamin v. Malcolm, 75 Civ. 3073 Judgment dated June 10, 1977 (S.D.N.Y.). Such a provision provides needed flexibility for emergency situations; at the same time, it also provides for prompt notice to the Court and counsel for petitioners and sets a time limitation on the use of this provision absent a specific extension by order of this Court. In respondents' view, it is crucial that such limited flexibility be included in the judgment and that the authority to activate this provisions reside with Warden who is the official directly responsible for running the institution and ensuring compliance with the Court's judgment. We would add, however, that given the emergency and exceptional nature of the provision, it would be activated only after the Warden had consulted with other appropriate officials at the regional, and possibly, the national level within the Bureau of Prisons.

In addition to the above comments, we request that the second sentence in paragraph 8 of petitioners' proposal be deleted. We believe that it is unnecessary in terms of

requiring respondents not to exceed a capacity of 449 and may also cause some confusion given petitioners' argument throughout this case that, for instance, the dormitory unit should only be used to house immigration cases (given the notation on early architectural sketches), or that the rooms on the second floor can only be used for drug treatment, psychiatric purposes, etc. The Court denied those claims and therefore this sentence should not be included in the judgment.

8. Social and Family Visits

In paragraph 9 of their proposal, petitioners have inaccurately described the visiting hours at MCC: the weekday evening hours are from 5:30 to 8:30 p.m., rather than to 7:30 p.m.* In all other respects, we believe that petitioners' paragraph 9 accurately described the practices and procedures for visiting at MCC; paragraphs 10(a) and 10(d) through (f) of the counter order incorporate the substance of that proposal. We have added a provision in paragraph 10(b) of the counter that will permit the MCC to reduce the visiting hours for the dormitory by 3 1/2 hours (one visiting period) on either Saturday or Sunday at the time the population in

* This discrepancy also appeared in the Court's opinion (at 59); we also wish to point out that, contrary to the statement in the opinion (*id.*), there are no visiting hours in the morning during the week. (Respondents' Post Trial Memo at 125-26)

-
A 2860

jw
-3599

that unit is reduced to 60 inmates pursuant to this Court's judgment. As the Court will recall, visiting on that unit was expanded in March, 1977 because of the larger number of inmates housed there. (Opinion at 59, Taylor Direct, Tr. 1919-20) In order to maintain an approximate equality among all inmates at MCC regarding visiting opportunities, respondents believe that it is necessary and appropriate to make the above described reduction; it should be noted that the dormitory will still have one extra 3 1/2 visiting period in order to take into account the larger number of inmates there (60 inmates compared to 48 inmates in the regular housing units). We therefore request that the Court include paragraph 10(b) in the judgment.

We believe that paragraph 10(h) of the counter order should be substituted for the first subparagraph of petitioners' paragraph 10. In our view, now that a formal judgment is being entered, the status quo which respondents must maintain under Court order should be spelled out in specific detail so that it is clear what is required. The provisions in petitioners' paragraph 9 (or the respondents' paragraphs 10(a) through (g)) provides the necessary clear notice of what is expected; moreover, they embody, in our view, the material and substantial details of the visiting procedures and facilities which were challenged in the amended petition. (¶¶ 55-63) Using petitioners' omnibus status quo approach, we believe, would incorporate needless or non-material details and goes beyond the natural import

A 2861

of the Court's order or the breadth of the amended petition. That proposal should therefore be rejected by the Court.

The second subparagraph of petitioners' paragraph 10 should also be deleted and paragraph 10(c) of the counter order should be inserted. Respondents do not believe that inmates should be permitted access to the bathroom located in the visiting rooms. The Court's opinion was unclear on this issue and we urge the Court to adopt respondents' position. First, even under the "pass key" system, inmates were not permitted to use the bathrooms. Second, giving inmates access to the bathroom during visits will provide inmates with a totally unsupervised period of time during which to hide contraband on their person or clothes in ways that can not be detected during the search after a visit. Third, permitting inmates to use the bathrooms increases the possibility that inmates may seek to use the bathrooms for improper conduct with their visitors. In general, it would permit inmates to be unsupervised during at least some portion of their contact visit, with all of the security problems attendant thereto. These factors we believe, should lead the Court to frame its order to prohibit inmates from using the visiting room bathrooms.

The third and fourth subparagraph of petitioners' proposal should be deleted as unnecessary and inappropriate for inclusion in this final judgment. Moreover, claims

A 2862

relating to these matters were not included in the amended petition under visiting (amended petition, ¶¶55-63), nor did petitioners request relief with respect to these matters. (Petitioners' Post Trial Memo, pp 301-B and 301-C)

Likewise, the fifth subparagraph of petitioners' paragraph 10 should be deleted. Respondents should be permitted flexibility on the number of staff assigned to the lobby for processing visitors; as stated by the Warden, in some instances it may be appropriate to use only one staff member, in others two or more. (Taylor Direct, Tr. 2087) That decision should be left to the informed discretion of respondents, and a rigid requirement should not be embodied in the Court's judgment.

9. Attorney Visits

Respondents' object to the omnibus status quo language which is contained in petitioners' first subparagraph of paragraph 11. As described above in the section on family and social visiting, we believe that the language should be limited to the specific matters outlined in the order and, therefore, we urge the Court to adopt the language in paragraph 11(a) of the counter order.

We also suggest the following changes to the other subparagraphs in petitioners' proposal. First, the exception noted with respect to subparagraph 11(a) is necessary so that if an attorney needs a private room because of the necessity to review tapes, or take formal statements, etc, then by calling ahead a room can be reserved for that special

jw
-3599

purpose. Second, although the attorney conference room is presently carpeted (and there are presently no plans to change that) if experience proves that it is being burned by cigarettes, or otherwise is not wearing well, the MCC would like the flexibility to remove it and replace it with tile without having to come back to the Court for a modification of this judgment. Third, we believe that the order should indicate that attorneys will be expedited through processing rather than petitioners' formulation that two processing lines must be maintained (subparagraph (c)). This formulation is more appropriate because at times when visiting is not heavy or when social visiting is not going on, only one officer may be assigned to the visitors' desk. Petitioners' proposal would unnecessarily impede the MCC's flexibility in assigning staff. Fourth, paragraph 11(d) of the counter order merely clarifies the meaning of petitioners' subparagraph (d). Fifth, we object to subparagraph (f) of petitioners' proposal. Again, this is an attempt by petitioners to have this Court order the use of a pass system at MCC when on two occasions the Court has specifically declined to do so.* We request that the Court again reject this proposal. Sixth, we assume that through an oversight, petitioners' have failed to

* See Section 2 above.

A 2864

to include provisions comparable to those in paragraphs 11(f) and (g) of the counter order. If an order is to be entered, we believe that paragraph 11(g) should be included; although we do not believe that it is necessary or appropriate to include paragraph 11(f) --or any aspect of either attorney or social visiting -- in the judgment, we raise this matter because it is a part of the MCC's revised program on attorney visits and was specifically mentioned in the Court's opinion. (Opinion at 63)

10. Visits With Co-defendants

With respect to this issue, we have merely clarified the language contained in paragraph 12 of petitioners' proposal.

11. Telephones

We suggest very limited revisions of petitioners' proposal (paragraph 13) which is a restatement of the preliminary injunction. With respect to the last sentence of subparagraph (a), we believe that it should read that the local phones are available from 6:30 a.m. to 11:00 p.m., "except during counts, emergencies and scheduled sanitation periods." (Paragraph 13(a) of the counter order) The emergency provision, we believe, was implicit in the preliminary injunction. Such an exception was specifically noted in MCC Policy Statement

1w
3599

7300.79 dated October 12, 1976, a copy which was provided to the Court and counsel by letter dated November 3, 1976, and petitioners' did not raise any objection to that interpretation of the preliminary injunction. As to the "scheduled sanitation period" exception, by letter dated July 22, 1977 to counsel for petitioners, we forwarded a copy of a memorandum which was to go into effect as of July 25, 1977, setting aside the period from 8:00 a.m. to 10:00 a.m. (or shorter, if appropriate) during the week for sanitation purposes, with a limitation on the other activities, including use of telephones which inmates may engage in during that period. A copy of the memorandum is enclosed. As you will note, the use of telephones for attorney calls during that period is still permitted. Petitioners have not objected to implementation of this procedure. We request that this exception be included in the judgment.*

With respect to subparagraph (b) of petitioners' proposal, we note that petitioners' have failed to list the number of long distance phones in the honor unit -- two.

* We request the same language in subparagraph (c)(5) of petitioners' proposal.

A 2866

In addition, subsequent to entry of the preliminary injunction, a long distance telephone was installed by respondents in the hospital unit. (Counsel for petitioners' was advised of this, and this fact was included as part of the Stipulation of Facts, ¶ V-14, p. 44.) We therefore wish to call this to the Court's attention.

With respect to subparagraph (c)(5) of petitioners' proposal, we request that the final phrase -- "1:00 p.m., to 9:00 p.m."-- be deleted. First, since approximately January 1977 to the present, the hours have been from 3:00 p.m. to 11:00 p.m., a change which was made at the inmates' request. (Respondents' Post Trial Memo, p. 144, fn*). Only the "eight hour each day" language should be included so that if a shift in the schedule is necessary, or desirable some time in future, it will not be necessary to seek a Court order for the change. Second, we would also request that the "emergencies", "counts", and "scheduled sanitation period, if applicable" language similar to that in respondents' paragraph 13(c)(5) be included in the judgment.

We also request that the Court include in the judgment paragraphs 13(c)(6) and 13(d) of the counter order. Paragraph 13(c)(6) embodies a practice which was adopted, after notice to the Court and counsel for petitioners, in November, 1976. (See letter to Michael Young, from Assistant United States Attorney Louis G. Corsi dated November 3, 1976) Paragraph 13(d) embodies a provision for changing the

A 2867

telephone services at MCC after notice and approval by the Court; this proposal tracks a similar provision on social and attorney visiting.

In connection with that aspect of the Court's opinion regarding telephone and social and attorney visiting, we wish to clarify the respondents' position. Although, as noted by the Court (Opinion at 70), respondents did not appeal from the preliminary injunction regarding telephones (or visiting), that ruling has been preserved for appeal purposes and will be subject to appeal at the time of entry of this judgment. 9 J. W. Moore, Federal Practice ¶110.18 pp. 205-07 (2d Ed. 1975) Further, as with social and attorney visiting, respondents do not believe that it is appropriate to embody the present facilities, practices or procedures in the Court's final judgment. The Court's earlier orders with respect to telephones and visiting were issued because of announced changes in the status quo before the Court had an opportunity, on a full record, to consider whether the challenged conditions met constitutional standards. Now, however, after a full trial, the Court has concluded that the telephone services are "adequate, if not generous" (Opinion at 69) and that with respect to social visiting, it

Class
0-3599 is not clear "[w]hether or not the Court would have ordered" as much visiting as respondents are now providing. (Id. at 60)* In this context, we believe that it is inappropriate and unnecessary to embody these matters in the final judgment.

12. Mail

We urge the Court to substitute respondents' paragraph 14 for that contained in petitioners' proposed order. The major difference between the two proposals is that respondents' proposal requires that the sender must also make a claim of privilege, as well as being an individual within the protected class. This procedure follows the procedure outline in the Bureau-wide regulations published in May, 1977, 42 Fed. Reg. 26,333, which were cited by the Court in its opinion (at 71-72). In respondents' view, such a claim of privilege on the envelope will reduce the occasions when special mail is inadvertently opened outside the inmate's presence. Such a procedure is quite reasonable and since the Court is ordering that respondents follow their own rules (Opinion at 71), we request that the Court include this procedure in the judgment.

Petitioners' paragraph 15 is acceptable. ____

* Likewise, the revision of attorney visiting facilities and procedures, undertaken voluntarily by respondent, are constitutionally adequate. (Opinion at 63-64).

13. Searches

We believe that the specific procedures or practices which the Court is prohibiting should be described in the judgment to ensure that respondents and their employees, as well as inmates at MCC, are clearly on notice as to what is expected. To that end, we have revised the first sentence of petitioners' paragraph 16; that revision is incorporated in the first sentence of paragraph 16(a).

Likewise, in paragraph 16(b) we have described in more detail the procedure which the respondents may generally use for inspections after contact visits. We object to petitioners' proposal that inmates may be permitted to keep on their underwear during an inspection. We do not believe the Court so ruled; indeed, if inmates are not required to remove their underwear, the portion of the body thereby covered will become a convenient and ready hiding place for contraband, and without the need to insert the contraband into the anus or genitals. Paragraph 16(b)(11) also describes the full procedure for inspections. Petitioners' proposal failed to mention several of these procedures. Since the Court's ruling was only with respect to the anal and genital search, we request that these other matters be included as permissible under the judgment.

C:as
10-3599

We further request that the Court delete the final sentences in the each of the subparagraphs of petitioners' paragraph 16. There was only one inmate who testified, after petitioners exhaustive discovery, to an alleged derogatory remark during the course of a strip search. Such a meager record hardly supports the notion that it is more than an isolated problem, if at all, or that an injunction is necessary. Respondents and their employees recognize what is expected during searches, and injunctive relief is unnecessary on this matter.

In addition, we have clarified petitioners' proposal by noting that the prohibition on anal or genital visual inspection relates only to searches after contact visits, either attorney or social. Petitioners' proposal is not clear on this (compare the first sentence of the first paragraph with the first sentence of the second subparagraph), although the amended petition (§ 63) and the proof at trial challenged this procedure only in the context of visits. We assume, therefore, that the Court's ruling does not prohibit the use of such a strip search procedure with a visual anal and genital inspection when, for instance, an inmate is admitted to the MCC or is returned to the MCC from a trip outside the institution.

A 2871

LC:as
10-3599

With respect to room searches, we have revised and expanded petitioners' paragraph 17. First, paragraph 17(a) of the counter order provides for removal of a detainee and continuation of a room search if the detainee attempts to disrupt the search or remove anything from his or her room or dormitory space. We believe that this is consistent with the intent and purpose of the Court's opinion. (Opinion at 83) Second, we are not sure what, if anything special, is meant by petitioners in stating that notice be given before searching a room. We do not believe that there is any need for such language since the inmate is de facto given notice because the correctional official must have the detainee* present during the search. Third, we believe the order should have an emergency provision which would permit searches without the presence of the inmate. Paragraph 17(b) drafted to account for that situation follows the procedure outlined with respect to opening outgoing mail in paragraph 4(a) and 4(b) of the Court's partial summary judgment order dated January 19, 1977.

* The definition of pretrial detainee should be consistent with that used under "CLASSIFICATION" and, contrary to petitioners' phrase, would exclude convicted individuals at MCC on writs of habeas corpus ad prosequendum.

LC:lj
10-359914. Seizure of Contraband

The first subparagraph of petitioners' paragraph 18 requiring respondents to immediately provide inmates with a procedure to protest a seizure is inconsistent with the intent and purpose of Court's opinion (at 88) and the second subparagraph of petitioners' proposal. We therefore request that the Court adopt respondents' paragraph 18 which provides the respondents with 90 days to prepare the required protest procedure, and describes generally what must be included in the procedures.

Further, we request that the Court not include petitioners' subparagraph (e). Once an inmate has been given the due process hearing required by the Court's opinion, and an item has been determined to be contraband, then, we submit, respondents are entitled to confiscate it. In that instance there is not a taking without due process. In the event that it were determined, after the hearing, that the item was not contraband, then the item would be returned to the inmate. Thus, there is no need for the provision which petitioners' have included in subparagraph (e).

In addition, we request that the Court provide an exception from the above-described requirements, as well as the receipt requirement embodied earlier in the Court's partial summary judgment order, for institutional property. Inmates do not have property rights in institutional property and it seems beyond what is necessary or appropriate

as
-3599 to require receipts and a due process procedure when the institution is seeking to retrieve institutional property such as silverware, plates, or excess amounts of institutional clothing or linen. We request that the Court incorporate the provision in paragraph 18(b) of the counter order in the judgment and thereby amend the affected portion of its earlier order on receipts.

15. Packages

The first sentence of petitioners' paragraph 19 is inconsistent with the terms of the Court's opinion (at 92) and the second sentence of petitioners' proposal. We request that the Court substitute paragraph 19 of the counter order for that proposal. The counter order also indicates that the regulations will describe the frequency with which inmates will be permitted to receive packages and the inspection procedures to be used.

16. Uniforms

Respondents request that the Court substitute paragraph 20 of the counter order for paragraph 20 of petitioners' proposal. Respondents believe that before implementation of the Court's order it is necessary to prepare rules and regulations concerning the amount and type of clothing a pretrial detainee may be permitted to possess and wear in the MCC pursuant to this judgment. The process of devising such rules should take 60 days to complete and respondents request that they be given that period of time

LC:as
10-3599

before the Court's order must be implemented. In addition, it will most likely take a comparable time period for the MCC to order and receive the uniforms for sentenced inmates and request that amount of lead time within which to implement this portion of the Court's order.

We have also revised subparagraph (c) in petitioners' proposal to make clear that if respondents issue uniforms (not jumpsuits) to sentenced inmates, they are required to wear those uniforms. (Paragraph 20(1) of the counter order) Also, we have revised the description of the uniforms to be issued to indicate that respondents may, but are not required to issue clothing items, other than the basic items such as shirts, pants, blouse, skirt or dress.*

17. Food Service

Petitioners' paragraph 21 goes well beyond the Court's findings or the natural import of the Court's opinion and should be deleted. We do not believe that the last sentence of petitioners' proposal regarding monitoring the rules and disciplinary action are proper subjects for inclusion in the judgment. We believe that respondents' proposal (paragraph 21 of the counter order) reflects what the Court

* Paragraph 20(d) in the counter order is taken from the Court's opinion (at 96).

0-3599 intended (Opinion at 97) and should be the formulation used in the judgment.

18. Exercise During Confinement in Administrative Detention

The Court's opinion ordered relief only on issue of exercise while an inmate is in administrative detention. (Opinion at 101-02) Nonetheless, petitioners have sought to embody in paragraph 22 of their proposal all aspects of confinement during administrative detention. We strongly object to this attempt and request the Court to reject petitioners' proposal and substitute paragraph 22 of the counter order.

In this regard, we note that the Court ordered that the daily exercise for inmates in administrative detention must be outdoor. (Opinion at 102) The policy statement is silent on whether the exercise must be indoor or outdoor, although it is recognized that daily exercise for inmates not in administrative detention is outdoors. Nonetheless, respondents' interpretation of the policy statement has consistently been to provide indoor exercise for inmates in administrative detention. When an inmate is in administrative detention, he or she is not normally permitted out of the room to use the exercise equipment in the unit at times other than the hour period required by the policy statement. Respondents' believe that this procedure is consistent with

at
-3599 the policy statement and the security concerns underlying the use of administrative detention. We therefore request the Court to permit the respondents to satisfy the requirement of daily exercise for inmates in administrative detention by providing indoor exercise.

18. Lock-in On Unit 5-South

We believe that an emergency exception, limited by the threat of violence or escape and duration (15 minutes) should be included in petitioners' paragraph 23. The exception, as drafted in paragraph 23 of the counter order, fully provides for the essential protections underlying the Court's opinion and gives a correctional officer the necessary limited flexibility to temporarily deal with a dangerous situation. In addition, we request that the parenthetical phrase "(Women's Unit)" should be deleted; the phrase is unnecessary.

19. Staff

Petitioners' proposal in paragraph 24 should be deleted and replaced by paragraph 24 of the counter order. The suggested requirement that correctional officers wait "two full minutes" is impractical and poses a substantial obstacle to correctional officers attempting to perform their functions in an efficient, timely and thorough manner. We do not believe that the Court intended such a restriction,

A 2877

LC:as

10-3599

or anything comparable; respondents' formulation, we believe, comports with the Court's opinion and provides the intended protection. Moreover, petitioners' requirements of a written statement of reasons should an emergency require immediate entrance, and a written set of regulations for disciplining staff members for future violations, should such occur, were not included in the Court's opinion and go well beyond what is appropriate or necessary. We request that the Court reject those proposals.

In respondents' proposal, we have also provided an exclusion to the knock and notice provision for the nighttime after lock-in when inmates are normally asleep. The intent behind this provision is to allow staff to make their normal counts during the night without waking the inmates.

We wish to raise one further matter regarding staffing. After the stipulation of facts had been finalized and submitted to the Court, respondents realized that there was an error in stipulation XXIII-2(a). On floor 5 there is normally only 1 officer assigned to the floor (units 5 North and 5 - South combined) during a 24-hour day. That error was corrected during the Warden's testimony (Taylor Direct, Tr. 1972), although we inadvertently failed to mention this correction in the subsequent proceedings or papers.

On this record, respondents believe that the difference in the staffing of that unit is not material and should not result in any revision of the Court's relief regarding staffing. During the day, there are additional staff members present in units 5 - South and 5 - North. (Opinion at 107) Moreover, as the Court noted, there was no evidence of violence or threats of violence which would suggest the need for an increase in staffing. We respectfully submit that the Court should not order further relief with respect to staffing.

20. Partial Summary Judgment Order

Respondents have no objection to petitioners' paragraph 25.

21. Remaining Portions of Petitioners' Proposal

Paragraph 26 of petitioners' proposal is unnecessary and should be deleted.

Respondents object to paragraph 27 of petitioners' proposal. Respondents recognize their responsibility to monitor and enforce compliance with the Court's order; that, we believe, has been confirmed by the experience under the previous orders in this case. We therefore believe that the requested provision is inappropriate and unnecessary and should be deleted.

22. Petitioners' Claims That Are Dismissed

Respondents are entitled to dismissals with prejudice against the petitioner class on all issues in the amended petition, the amendments to the amended petition, and raised at trial which are not otherwise provided for in the judgment. We have therefore embodied that in paragraphs 26 through 49 of the counter order, and request that those paragraphs be included in the judgment.

23. Stay

Respondents request that the Court initially stay part of its judgment for ten days, and if the respondents file a notice of appeal within that time, then the stay will be automatically extended, pending a decision by the Court of Appeals. We believe that this partial stay is necessary and appropriate in this case now that final judgment is being entered. The issues are significant and far-reaching, and the respondents should be given an opportunity for review by the Court of Appeals on these issues before being required to absorb the substantial expenditures and dislocations that respondents believe will necessarily flow from the Court's decision. In this regard, respondents have asked for a stay only on those matters which are most serious or substantial matters, and are prepared to go forward on the other matters, whether or not an appeal on these other matters is ultimately taken.

A 2880

LC:as
10-3599

In requesting the partial stay described in paragraph 50 of the counter order, we wish to note that respondents' are committed to presently begin to prepare the compliance reports, regulations, rules or statements required by the Court's opinion, and to have those materials ready on schedule in order to be prepared to promptly implement them should those aspects of the Court's decision be affirmed. We submit that this suggested procedure for a stay and commencement of preliminary preparation, is reasonable and appropriate in the circumstances of this case.*

* Should the Court grant all or part of the respondents request for a stay, but not adopt any or only a part of respondents' counter order, we request the Court to specifically delineate the stayed issues.

A 2881

C:as
0-3599

CONCLUSION

For all the foregoing reasons, we respectfully request that the Court revise petitioners' proposed judgment in accordance with the counter order submitted herewith.

Dated New York, New York

October 11, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Respondents

LOUIS G. CORSI,
FREDERICK P. SCHAFFER,
Assistant United States Attorneys

-Of Counsel-

TO : Inmate Population
FROM : *J. J. Sullivan*
Associate Warden - Programs

A 2882

DATE July 22, 1977

SUBJECT: Unit Sanitation

Effective Monday, July 25, 1977, there will be a Unit Sanitation Inspection period as follows:

Monday through Friday
beginning after breakfast,
and up until 10 00 a.m.
a Unit clean-up period
is established.

There will be no activities
(such as - no T.V., no pool
playing and no telephone calls etc.)

Activities will start again
as soon as clearance has been
given by a Unit Team Member
of a satisfactory inspection.

If clearance is given before
10 00 a.m., then activities
may start earlier.

Telephone calls to attorneys can be made during the inspection with
prior approval of the Unit Manager or his Representative.

Newspaper delivery to the Unit will commence at the completion
of the Unit Inspection.

Authorized institution passes, such as to the Hospital and to
Court will be honored. Prior to leaving for the call-out the
inmate is responsible to ensure that his room meets sanitation
inspection, failure to do so will result in disciplinary actions.

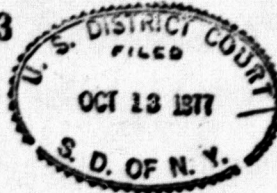
cc: All Unit Teams
Unit Bulletin Boards
C.C.S.
All Correctional Supervisors
Read at Roll Call for Two (2) Weeks

(2)
LC:jw
75-3973
19-3599

MR CORSI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 2883



UNITED STATES OF AMERICA ex rel. :
LOUIS WOLFISH, et al., :

Petitioners, :

-against- :

PARTIAL JUDGMENT

75 Civ. 6000 MEF

THE HONORABLE EDWARD LEVI; :
NORMAN A. CARLSON, Director, :
United States Bureau of Prisons; :
LARRY TAYLOR, Warden, Metropolitan :
Correctional Center, :

Respondents. :

FRANKEL, D.J.:

The petitioner class which, by order of this Court dated December 23, 1975, consists of all persons who are or will be confined in the Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York having moved this Court for partial summary judgment; and the respondents having moved for partial summary judgment; and the Court having ordered summary judgment with respect to double-celling; receipt of books, periodicals, and other materials; receipts for the seizure of inmate possessions; and mail; and the Court having granted partial summary judgment in favor of the respondents on other issues; and the Court having heard testimony and received other evidence as to other issues in the case; and the Court having considered the affidavits, transcripts, exhibits, and memoranda, and having toured the facility; and having considered all papers and proceedings herein; and the Court having dismissed certain of petitioners' claims at the close of their case; and the Court having rendered its decision and issued an opinion on September 15, 1977 on all the issues except those relating to health care; and there being no just reason to delay entry of this partial judgment, now therefore judgment is entered and it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them, be, and they hereby are, enjoined from confining any member of the petitioner class at MCC except under the following conditions:

CLASSIFICATION

(1) (a) Within 90 days of entry of this partial judgment respondents shall prepare and institute a system to classify and separate pretrial detainees from sentenced inmates, and classify and separate those inmates who pose a serious threat of violence, escape or attempt to escape from those inmates who do not pose such dangers. Said system of classification and separation shall include the following exceptions:

(i) respondents are permitted to assign both pretrial detainees and sentenced inmates to the following housing units at the MCC:

- (A) the women's unit;
- (B) the protective custody unit;
- (C) the high security unit;
- (D) the hospital.

1051 (ii) At any time when the MCC is approaching its capacity, either overall or as to a particular type of unit under this classification system, respondents shall use their best efforts to maintain the classification and segregation set forth above and, at such times, should an inmate be assigned to a unit not otherwise the properly designated one (i.e., a pretrial detainee assigned to a sentenced unit), respondents shall reassign such inmates to the properly designated unit as soon as a room becomes available in such unit.

(b) For the purposes of this order, an inmate convicted of a state, local or federal offense who is at the MCC pursuant to a writ from any local, state or

A 2885

federal correctional, detention or penal institution, whether or not said inmate still has other criminal charges pending against him, shall be considered and classified in the same category as a sentenced inmate and shall not be considered or classified as a pretrial detainee.

LENGTH OF CONFINEMENT AT THE MCC

2(a) Within 14 days after entry of this partial judgment, no inmate incarcerated or detained at the MCC on that date or subsequent thereto may be incarcerated or detained at the MCC for a period of more than 60 consecutive days without said inmate's voluntary written consent thereto.

(b) As soon as it is known by officials at the MCC that an inmate's incarceration or detention at the MCC will exceed 60 consecutive days, and in any event no later than one week prior to expiration of the aforesaid 60 day period, the inmate shall be informed, by written communication, of his or her right to be transferred from the MCC. Within five days after an inmate is advised of his or her right to be transferred under this provision, said inmate shall advise the MCC in writing whether he or she wishes to be transferred or whether he or she wishes to waive transfer and remain at the MCC. Nothing contained herein shall preclude the respondents from transferring an inmate from the MCC at any time before or after expiration of the aforesaid 60 day period.

(c) Within 14 days after entry of this partial judgment, the respondents shall prepare a written form for use in notifying those inmates to whom paragraph 2(b) applies of their rights under paragraph 2(a) and (b); said form shall also include the following:

(i) A space wherein the inmate shall notify the MCC, in writing, of his or her decision to exercise his or her right of transfer or waive said right, acknowledging that said decision is being made voluntarily;

inmate (i.e., pretrial or sentenced) and the date the inmate was discharged or transferred from the MCC. A 2886

(d) Respondents shall maintain and keep a file of all forms executed by inmates pursuant to paragraph 2(b) and (c), and said file shall be available for inspection and copying, upon reasonable notice, by counsel for petitioners.

MUSLIMS' DIETARY REQUIREMENTS

3(a) Respondents are hereby enjoined from providing observant Muslim inmates pork-free meals which consist of deleting the pork item from the meal and substituting an extra helping of potatoes or other vegetable.

(b) Respondents shall forthwith provide observant Muslims with the same pork-free meals provided to observant Jews or shall provide said observant Muslims with meals which are substantially identical in nutritional value to those served to observant Jews.

LAW LIBRARY

4(a) Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a plan to provide inmates who are pro se in any criminal or civil proceeding pending in any court with physical access for reasonable periods of time to adequate law library facilities for the purpose of preparing the documents by which to commence, maintain or defend such a proceeding notwithstanding that the court before which the inmate is appearing has the discretion to appoint counsel once the action has begun (18 U.S.C. §3006(A)(j)), and whether or not the inmate is represented by counsel in another proceeding.

Nothing contained herein shall limit the right of the respondents to deny an inmate physical access to said law library subsequent to the appointment or retention of counsel in the proceeding in which said inmate had therefore proceeded pro se.

(b) The means by which respondents may choose to comply with the requirements of paragraph 4(a) include but ^{is} not limited to transporting the affected inmates to local law libraries, expanding the law library facilities and materials at the MCC and permitting the affected inmates physical access to that law library, and establishing a program of legal services within the MCC.

(c) Should respondents elect to comply with the provisions of paragraph 4(a) by providing the affected inmates with physical access to the law library facilities within the MCC, respondents shall undertake as part of their compliance the following measures:

(i) Prepare an updated and accurate list of all volumes contained in the MCC law library;

(ii) Acquire and maintain as part of the MCC law library (and to be included in the list described in paragraph 4(c)(i)) one set of the Federal Second and Federal Supplement series extended back to 1950; volumes presently missing from the series now stocked; a complete set of the Modern Practice Digest series; and add the Federal Practice Digest Second series. Said additions to the law library shall be made within 90 days of the Court's approval of the respondents' plan for compliance;

(iii) Provide inmates with access to state law materials through some lending arrangement with local law libraries;

A 2888

(iv) Provide adequate space for the law library so that a reasonable number of inmates may use the facilities at the same time.

(v) Schedule the hours of operation for the law library so that it is available for inmate use five days per week, for a reasonable period each day.

5(a) Respondents shall not prohibit inmates at the MCC from acquiring or possessing their own typewriters while incarcerated or detained at the MCC.

(b) Respondents may inspect said personal typewriters for contraband before permitting the inmate to possess and maintain said typewriter at the MCC.

COMMISSARY

7uEF 6(a) Inmates at the MCC shall be permitted to submit purchase orders to the MCC commissary on an every other day basis, ~~Monday through Friday, except on holidays and when quarterly inventories are being taken.~~ A purchase order shall be filled by the MCC and delivered to the ordering inmate ^{within 24 hours after} ~~on the day following~~ submission of the order, except that an order submitted on Friday or the day preceding a holiday or commencement of a quarterly inventory will be filled and delivered on the following Monday or the day following the holiday or completion of the quarterly inventory, respectively.

7uEF (b) The commissary order form provided to inmates shall include a provision for the inmate to make a second choice among the available items in the event that one or more of the inmate's first choice of items is not available.

(c) Nothing contained herein shall preclude the respondents, if they choose, from establishing a commissary system which provides inmates with direct access to the commissary on an every-other-day basis.

A 2889

(d) Respondents are hereby enjoined from endorsing checks or money orders made to the order of an inmate without the inmate's written consent thereto. Respondents may endorse an inmate's check or money order only on written consent of the inmate after written notice that he may refuse to give such consent and that in the event of refusal to consent, respondents will permit said inmate to endorse checks and money orders. Nothing contained herein shall be interpreted to require separate written consent for each check or money order, in the event that an inmate has signed the above described notice and consent form. An inmate who has given the above-described consent may, upon written notice delivered to his or her unit manager, revoke said consent.

(e) Respondents shall credit checks to the appropriate inmate's commissary account within 15 days in the case of checks drawn on a bank located within the continental United States, and within 30 days in the case of checks drawn on a bank located outside the continental United States, from the date that

(i) the check is received and endorsed by the MCC pursuant to the inmate's consent as set forth in paragraph 6(d); or

(ii) the inmate gives the check to the MCC after said inmate has personally endorsed the check pursuant to paragraph 6(d).

The 15-day and 30-day period set forth herein may be extended for a longer period for good cause communicated to the inmate in writing.

A 2890

CAPACITY OF MCC

7. Within 60 days of entry of this partial judgment, and except as provided in paragraph 9(b) below, respondents shall not house more than 10 inmates in each of the six dormitory rooms on Unit 11 South at the MCC, or more than a total of 60 inmates in that unit.

8. Within 30 days of entry of this partial judgment, and except as provided in paragraph 9(b) below, respondents shall not house inmates on beds placed in corridors, balcony areas or commons areas.

9(a) Except as set forth below, the inmate population at MCC shall not be permitted to increase to more than 449 inmates, to be allocated among the units as follows:

2nd Floor	Not more than 29 inmates
3rd Floor	Not more than 24 inmates
5-N	Not more than 48 inmates
5-S	Not more than 48 inmates
7-N	Not more than 48 inmates
7-S	Not more than 48 inmates
9-N	Not more than 48 inmates
9-S	Not more than 48 inmates
11-N	Not more than 48 inmates
11-S	Not more than 60 inmates

(b) In the case of an emergency certified in writing by the Warden, and for a period not to exceed ten days, the capacity of the MCC may be increased beyond 449 as set forth above by temporarily housing more than 10 inmates in one or more of the dormitory rooms on Unit 11 South, or housing inmates on beds on a corridor, balcony or commons area in one or more of the units, or by placing two inmates in one or more of the individual rooms throughout the MCC.

A 2891

In the event of such an emergency, a copy of the written certification from the Warden shall promptly be forwarded to the Court and counsel for petitioners; said certification shall set forth the facts underlying and the reasons for invoking this emergency provision and shall indicate the present extent of the increase in capacity above 449, and the expected duration of the emergency. By the end of the aforesaid 10 day period, the inmate population at MCC shall be at or below 449 unless this Court, by specific order, permits otherwise.

SOCIAL AND FAMILY VISITING

10. Respondents shall maintain and continue the following hours, practices, and procedures for family and social visits at the MCC:

(a) Visiting hours at the MCC shall be maintained as set forth below:

<u>Days</u>	<u>Hours</u>	<u>Unit</u>
Tues-Friday	12:30 PM to 4:00 PM 5:30 PM to 8:30 PM	All Units
Saturday	8:30 AM to 12:00 PM 12:30 PM to 4:00 PM	3, 7N, 7S, 11N, 11S 2, 5N, 5S, 9N, 9S, 11 S
Sunday	8:30 AM to 12:00 PM 12:30 PM to 4:00 PM	2, 5N, 5S, 9N, 9S, 11S 3, 7N, 7S, 11N, 11S

When Monday is a legal government holiday, the Sunday visiting schedule shall prevail.

(b) Notwithstanding the provisions contained in paragraph 10(a) above, respondents are permitted to reduce the visiting hours for the 11-South Dormitory Unit by 3 1/2 hours on either Saturdays or Sundays at such time as that unit is reduced to a population of 60 inmates pursuant to paragraphs 7 and 9 above.

(c) The bathrooms located in the visiting rooms shall be kept open for use by visitors (but not inmates) and shall be locked only by the visitor using such facility.

A 2892

(d) Each inmate shall be entitled to receive three visits per week. Conditions permitting, the maximum visiting time per visit shall be the entire visiting period. In the event of overcrowding (more than 25 persons in any visiting room), the visiting room officer may reduce the visiting time allowed, but in no event may the duty officer reduce a visit to less than one hour. Only in the event of extreme overcrowding, and then only when that determination is made by the duty correctional supervisor, may a visit be shorter than one hour. In the event of such extreme overcrowding, visiting hours may be extended.

(e) Visits are limited to three persons visiting one inmate at a single time. An inmate's children under the age of 16 are not included in this three-person limit. If additional family members are present, the visit should be divided into two groups, each group visiting for half the allotted visiting period. Each visiting period shall be counted as one visit for purposes of calculating the number of visits allowed per week.

(f) Each inmate shall be permitted to identify six friends or relatives for his or her approved visitors list. Children under the age of 16 are not to be counted in the limitation of six visitors. Inmates shall be permitted regular opportunities, but not more than once per week, to change the names of visitors on their approved list.

(g) Respondents shall continue to authorize special visits under circumstances authorized prior to this order.

(h) The hours and procedures described in paragraph 10(a) through (g) may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

ATTORNEY VISITS

A 2893

11. Respondents shall maintain and continue the following hours, practices, and procedures for attorney visits at the MCC:

(a) Attorney visits shall be permitted from 8:00 a.m. to 8:30 p.m., seven days per week, with no requirement that prior notice of the visit be given except when special accommodations or facilities are necessary;

(b) The attorney conference room on the third floor, consisting of five individual rooms with doors and a large, common space provided with tables, shall be maintained;

(c) The MCC shall continue to expedite the processing of attorneys;

(d) The special filing cabinets for inmate visitors' lists shall be maintained;

(e) Respondents shall continue to monitor the attorney conference area to assure that attorneys are given prompt entrance to and exit from the conference area; and

(f) Attorneys shall be given, after processing, an identification pass and will be permitted to proceed unescorted except if, on a case-by-case basis, it is determined by respondents that such unescorted access would pose a threat to the security of the institution or individuals therein; and

(g) The hours and procedures described in paragraph 11(a) through (f) may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

VISITS WITH CO-DEFENDANTS

A 2894

12. Respondents shall permit co-defendants in a case who are incarcerated or detained at the MCC to engage in joint legal visits unless a specific court order is in force directing otherwise.

TELEPHONES

13. Respondents shall continue to provide telephone service for inmates at MCC as set forth below.

(a) Local calls

The current total of 23 pay telephones shall continue to be "restricted dialing," permitting calls to only the 212 area code. The distribution of these telephones shall remain as follows:

<u>Unit</u>	<u>Number of Pay Telephones</u>
Honor Unit	1
Hospital Unit	1
3	2
5-N	
5-S	2
7-N	2
7-S	2
9-N	2
9-S	2
11-N	3
11-S	4

These telephones shall continue to be available for inmate use from 6:30 a.m. to 11:00 p.m., except during counts [^] emergencies, ~~or scheduled sanitation periods.~~

MEF

(b) Long-distance calls

A 2895

(1) Respondents shall continue to operate 22 long-distance telephones on an 11 trunkline system routed through the MCC switchboard. These long-distance telephones shall continue to be distributed as follows:

<u>Unit</u>	<u>Number of Long-Distance Telephones</u>
Honor Unit	2
3	2
5-N	2
5-S	2
7-N	2
7-S	2
9-N	2
9-S	2
11-N	2
11-S	4

(2) Inmates shall continue to be permitted to make (i) collect calls without following the procedures hereinafter described in subparagraphs (A) through (F); and (ii) calls charged to their commissary accounts in the manner hereinafter described in subparagraphs (A) through (F) through the MCC long-distance switchboard. Advance written authorization by the inmate shall be required for each call an inmate wishes to charge to his commissary account. Such a commissary charge shall be made in the following manner:

(A) An inmate must convey a written authorization for each commissary charge call, including the telephone number to be called, to the MCC commissary by presenting such authorization to a designated housing unit officer. A separate authorization must be submitted for each such call;

A 2896

(B) If the inmate's commissary account has a balance of at least \$10 and the requested charge call is within the continental United States, the written authorization for a commissary charge call must be presented to the designated housing unit officer at least four hours prior to the time the inmate wishes to place the call, and upon its approval by the MCC commissary, the said authorization shall be delivered to the long-distance operator;

(C) An inmate whose commissary account reflects a balance of less than \$10 or who wishes to charge a call to a destination outside the continental United States shall present the required authorization to the designated housing unit officer at least 24 hours in advance of the time the inmate wishes to place the call so that MCC officials may confirm in advance that the inmate's account reflects sufficient funds to pay for the cost of the call;

(D) At the time an inmate wishes to make a commissary charge call for which he has previously submitted written authorization as provided in (2)(A) through (2)(C), said inmate using the long-distance telephone in his housing unit, (i) shall identify himself to the long-distance operator, and (ii) shall identify the call he wishes to charge to his commissary account. The operator, upon determining that the inmate has provided the appropriate written authorization and that the MCC commissary has approved said call, shall place the call;

(E) Inmates shall be provided a written receipt for each commissary charge call made; and

(F) If an inmate's commissary account contains insufficient funds to meet the requirements of (2)(B) or (2)(C) above, the long-distance operator shall not place the requested commissary charge call.

(c) Miscellaneous provisions for long-distance calls.

(1) All long-distance calls shall be limited in length to 10 minutes. This 10-minute period shall commence when the called party answers the telephone.

(2) A sign-up list shall be posted near each long-distance telephone for collect and pre-paid calls in order to encourage orderly and equitable use of the telephones.

(3) Emergency need for a telephone, including instances in which an inmate does not have funds to pay for a needed telephone call, shall be handled on a case-by-case basis, as is the current MCC policy.

(4) Inmates lodged in the hospital unit shall be given access to long-distance telephones on an individual basis.

72EF (5) The long-distance switchboard shall be open eight hours each day, seven days per week, except during counts ^{from 11:00 p.m. to 6:00 a.m. for inmates to perform or} emergencies, ~~and, if applicable, scheduled sanitation periods~~ ^{11:00 p.m. a respondent may determine.}

(6) Nothing contained herein shall prohibit the respondents from requiring inmates to make telephone calls to destinations overseas through the institutional telephone system rather than the above-described long distance telephone system.

(d) The hours, procedures and facilities described in paragraphs 13(a) through (c) above may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

MAIL

A 2898

14(a). Respondents and their employers shall open incoming "Special Mail" only in the presence of the inmate for inspection for physical contraband.

74EF (b) In the absence of the sender making a claim of privilege on the envelope by clearly identifying himself and including the statement "Special Mail-open only in the presence of the inmate" respondents and their employees may treat the mail as general correspondence and may open said mail outside the presence of the inmate to inspect said mail for physical contraband.

74EF (f) "Special Mail" shall include any letter from any of the following persons or institutions, provided that such mail is identified as set forth in paragraph 14(b) above:

- (i) letters from attorneys;
- (ii) letters from federal courts;
- (iii) letters from state courts;
- (iv) letters from members or committees of Congress
- (v) correspondence from embassies and consulates;
- (vi) correspondence from the United States Department of Justice or any of its divisions;
- (vii) correspondence from state governors;
- (viii) correspondence from state attorneys general; and
- (ix) correspondence from prosecuting attorneys.

15. Respondents shall forward mail received at the MCC for an inmate who has been transferred to another institution or who has been released.

SEARCHES

16(a). Respondents and their employees are enjoined from conducting a visual search of the anus, ^{or} ~~vagina and genitals by requiring the inmate, in the case of~~ ^{of such}

~~men, to raise the genitals and spread the buttocks, and in the case of women, to spread the vagina and buttocks, as part of the strip search procedure used after contact~~ visits, except that respondents and their employees are permitted to require such inspection of the genitals and anus upon a specific and particular showing of probable cause to believe that the inmate is concealing contraband in his or her genital or anal area. Such probable cause must be recorded in writing, upon sworn statements of first-hand knowledge, with a written record of the reasons, results, and circumstances of each such search. A copy of such written record shall be given to the inmate, and a copy shall be maintained and preserved by the respondents. In the event such examination occurs, it is to be conducted in private and in the presence of only those persons whose presence is essential for reasons of security.

(b) Nothing contained in paragraph 16(a) shall limit the right of respondents and their employees to require an inmate to undergo the following inspection after a contact visit:

- (i) Remove all clothing including underwear;
- (ii) Raise arms, present open hands, lift feet, run fingers through hair and open mouth;
- (iii) Have all clothing inspected.

Said inspection shall be conducted in private, in the presence of only those persons necessary for security.

17(a). Each pretrial detainee, excluding writ cases as set forth in paragraph 1(b) above, shall be permitted to observe a search of the residential room, or sleeping space within a dormitory room, to which said detainee has been assigned, except that should a detainee attempt to disrupt the search of his or her room or dormi-

tory space or remove anything from his or her room or dormitory during the search said detainee may be removed from the area of the search and the search may be continued without said detainee's presence.

(b) Notwithstanding the requirements of paragraph 17(a) above, individual residential rooms within the MCC or the six dormitory rooms in Unit 11 South to which pretrial detainees are or may be assigned may be searched, without the presence of the detainee, upon a showing of good cause approved in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden. At the time of such a search or as promptly thereafter as practical, each detainee whose room or dormitory space was searched pursuant to this provision shall be given written notice of said search.

SEIZURE OF CONTRABAND

18(a). Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a statement of procedures by which an inmate may contest the confiscation and forfeiture of personal property. Said procedures shall provide for the following:

- 716F
- (i) A brief statement to the inmate setting forth the basis for the seizure;
 - (ii) Notice to the inmate of the right to respond in a reasonably simple and convenient manner, and to assert grounds, if any, why the seizure is claimed to be unwarranted;
 - (iii) A suitable opportunity to meet and answer controverted evidence thought to warrant confiscation;
 - (iv) A decision setting forth reasons, however brief.

MEF (b) ~~The procedures set forth in paragraph 18(a) above and in paragraph 3 of the order dated January 19, 1977, shall not apply to the seizure and confiscation of institutional property of the MCC.~~

PACKAGES

19. Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a set of regulations permitting inmates to receive packages from outside the MCC. Said regulations shall include specifications as to the volume, frequency and character of the packages inmates will be permitted to receive, and the inspection procedures to be used in connection with receipt of such packages.

UNIFORMS

20(a). Sixty days after entry of this partial judgment:

(i) Respondents are enjoined from requiring inmates at the MCC to wear the jumpsuit uniforms presently in use at the MCC.

(ii) Pretrial detainees at the MCC shall be permitted to wear their own clothing unless they consent to wear the uniforms described in paragraph 20(a)(iv) below.

MEF (iii) Sentenced inmates shall be permitted to wear their own clothing unless the respondents provide said inmates with the uniform described in paragraph 20(a)(iv) below; upon the issuance of said uniforms, sentenced inmates ^{inmate} shall be required to wear said uniforms rather than their own clothes. A sentenced inmate may wear the jumpsuits presently in use at the MCC only if said inmate volunteers to wear the jumpsuit.

(iv) Uniforms at the MCC shall consist of the following:

ref (A) Men: shirts and trousers; the respondents may, but are not required, to issue other conventional items;

just (B) Women: dresses, or blouses with skirts or slacks; the respondents may, but are not required, to issue other conventional items.

(v) Uniforms issued by respondents shall reasonably fit the wearer.

(b) Inmates shall be permitted to wear their own undergarments or, if respondents choose, shall be provided with new ones.

(c) In connection with the implementation of paragraph 20(a) above, respondents may prescribe and implement reasonable rules and regulations regarding the amount and type of personal clothing that a pretrial detainee or sentenced inmate, if applicable, may possess at the MCC, and the procedures whereby and frequency with which said inmates may receive or exchange personal clothing items from outside the MCC.

(d) The requirements set forth herein are subject to reconsideration and modification by the Court upon due notice and hearing.

FOOD SERVICE

21. Within 30 days of entry of this partial judgment, respondents shall issue and enforce a new statement of regulations which require all employees, civilian or inmate, working in food preparation, storage, and service to wear hand and head coverings while handling food.

EXERCISE DURING CONFINEMENT IN ADMINISTRATIVE DETENTION

22. Inmates placed in administrative detention, either in their regular housing unit or in a special unit designated for administrative detention, shall normally be provided, consistent with existing available resources and the security needs of the unit, with an opportunity for one hour of indoor exercise per day. In the event that an inmate in administrative detention is not provided with the opportunity for one hour of indoor exercise per day, the inmate shall be informed, in writing, by the Chief Correctional Officer, an Associate Warden or the Warden of the reasons for not being provided with that opportunity.

LOCK-IN ON UNIT 5-SOUTH

23. Respondents are hereby enjoined from the practice of locking inmates assigned to unit 5-South into the rooms in that unit without toilet facilities for administrative detention, disciplinary segregation, unit-wide emergencies or any other reason, except that an inmate who has become violent or presents a clear and present danger of violence or escape may be locked into one of those rooms for not more than 15 minutes pending transfer to another room with toilet facilities.

STAFF

24. MCC correctional officers and other staff at MCC are enjoined from entering the rooms, toilets and shower rooms used by inmates of the opposite sex unless the said correctional officer or staff member first knocks on the door or announces his or her presence and gives suitable warning to the inmate that said officer or staff member is about to enter the area, except that said notice may be omitted: (a) in an emergency, or (b) during the hours of 11:00 P.M. to 6:30 A.M. when inmates are normally asleep.

PARTIAL SUMMARY JUDGMENT ORDER

25. This Court's partial summary judgment order dated January 19, 1977 is incorporated herein by reference.

PETITIONERS' CLAIMS THAT ARE DISMISSED

With respect to the following claims asserted by the petitioners in the amended complaint dated January 12, 1976, the amendments to the amended petition dated November 17, 1977, or at the trial of this action, judgment is hereby entered against the aforesaid petitioner class dismissing said claims with prejudice and on the merits:

26. All claims set forth in paragraph 6 of the amended petition, except as specifically provided above.

27. All claims set forth in paragraphs 7 through 18 of the amended petition, and as amended by paragraphs 10 and 11 of the amendments to the amended petition, except as specifically provided above.

28. All claims set forth in paragraphs 19 through 27 of the amended petition except as specifically provided above.

29. All claims set forth in paragraphs 46 through 54 of the amended petition except as specifically provided above.

30. All claims set forth in paragraphs 55 through 68 of the amended petition and as amended by paragraph 60 of the amendments to the amended petition, except as specifically provided above.

31. All claims set forth in paragraphs 69 through 75 of the amended petition.

32. All claims set forth in paragraphs 76 through 85 of the amended petition.

33. All claims set forth in paragraphs 86 through 98 of the amended petition except as specifically provided above.

A 2905

34. All claims set forth in paragraphs 99 through 102 of the amended petition except as specifically provided above.

35. All claims set forth in paragraphs 103 through 105 of the amended petition except as specifically provided above.

36. All claims set forth in paragraphs 106 through 108 of the amended petition.

37. All claims of paragraph 109 of the amended petition except as specifically provided above.

38. All claims set forth in paragraphs 110 through 113 of the amended petition except as specifically provided above.

39. All claims set forth in paragraphs 114 through 117 of the amended petition except as specifically provided above.

40. All claims set forth in paragraphs 118 through 124 of the amended petition.

41. All claims set forth in paragraphs 125 through 128 of the amended petition except as specifically provided above.

42. All claims set forth in paragraphs 129 through 132 of the amended petition except as specifically provided above.

43. All claims set forth in paragraphs 133 through 138 of the amended petition.

44. All claims set forth in paragraphs 139 through 142 of the amended petition.

45. All claims set forth in paragraphs 143 and 144 of the amended petition except as specifically provided above.

46. All claims set forth in paragraph 145 of the amended petition.

A 2906

47. All claims set forth in paragraphs 146 through 149 of the amended petition.

48. All claims set forth in paragraphs 150 through 154 of the amended petition except as specifically provided above.

49. All claims set forth in paragraphs 150(a) of the amendments to the amended petition.

STAY

50. (a) The following portions of this partial judgment are hereby stayed for an initial period of ten (10) days from the date of entry of this partial judgment.

MSF (i) Paragraphs 1, ~~2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19~~ and 20.

(b) Upon respondents' filing a notice of appeal from this partial judgment within the above-described ten (10) day period, the aforesaid stay shall be automatically extended and remain in effect until the Court of Appeals renders its decision on the appeal in this case.

(c) Notwithstanding the stay set forth in paragraphs 50(a) and 50(b) above, respondents shall begin to prepare the reports, statements, rules or regulations required by paragraphs 1, 2, 4, 19 and 20(c) above; respondents shall have those reports, statements, rules or regulations ready for submission to the Court and counsel within the time periods set forth in paragraphs 1, 2, 4, 19 and 20(c) above, respectively, except that respondents shall not be required to submit ~~said~~ ^{the} reports, statements, rules or regulations to the Court or counsel during the pendency of the stay provided herein and until further order of this Court or the Court of Appeals.

Dated: New York, New York

Oct. 13, 1977

JUDGMENT ENTERED - 10/13/77

Marvin E. Frankel
MARVIN E. FRANKEL
United States District Judge

under
paragraphs
1, 4, and
20 to

A 2907

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

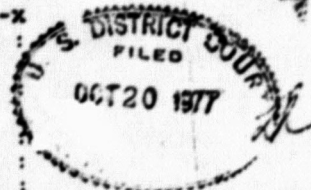
UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI;
NORMAN A. CARLSON, Director,
United States Bureau of Prisons;
LARRY TAYLOR, Warden,
Metropolitan Correctional Center,
et al.,

Respondents.



NOTICE OF MOTION

75 Civ. 6000 MEP

S I R S :

Upon the annexed affidavit of Phyllis Skloot Bamberger and the accompanying memorandum of law, petitioners seek, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, an order altering and amending the judgment entered on October 13, 1977.

Yours, etc.,

PHYLIS SKLOOT BAMBERGER,
THE LEGAL AID SOCIETY,
Attorney for Petitioners

By: Phyllis Skloot Bamberger
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Dated: New York, New York
October 17, 1977

To: The Honorable Marvin E. Frankel
United States District Judge
Southern District of New York

The Honorable Robert B. Fiske, Jr.
United States Attorney
Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI;
NORMAN A. CARLSON, Director,
United States Bureau of Prisons;
LARRY TAYLOR, Warden,
Metropolitan Correctional Center,
et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHYLIS SKLOOT BAMBERGER, being duly sworn, deposes and says:

I am Attorney in Charge of the Federal Defender Services Appeals Unit of The Legal Aid Society, assigned to represent the petitioner class in this action. I make this affidavit pursuant to Rule 59(e) of the Federal Rules of Civil Procedure in support of a motion for an order altering and amending the judgment of October 13, 1977.

This motion is necessitated because petitioners did not have an opportunity to respond to the proposed counter order submitted by respondents and adopted in part by the Court. In several significant ways, the judgment is inconsistent with the express language, findings, and holdings of the opinion of this Court filed on September 29, 1977.

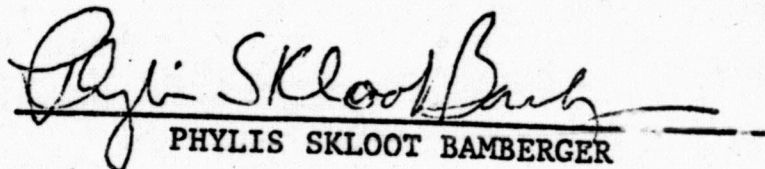
It was my expectation that, as has been done in the prior procedures in this case, petitioners would have time to respond to the counter proposal. Accordingly, after receiving the proposed counter order late in the afternoon of October 11 and examining it on October 12, on October 13 I wrote a letter to this Court advising the Court that we planned to file a response on a specific date and requesting that date. Before the letter could be delivered, I was advised that the final order had been signed and filed on October 13.

This motion is necessary because, as the accompanying memo-

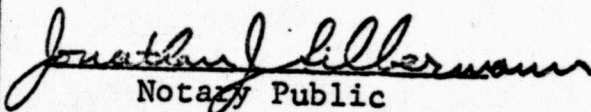
A 2909

randum demonstrates, there are major inconsistencies between the proposed counter order and the opinion which were adopted in the order. These relate to classification, overcrowding, length of stay, administrative detention, and notice.

WHEREFORE, it is respectfully prayed that the Court enter an order altering and amending the order of October 13, 1977.

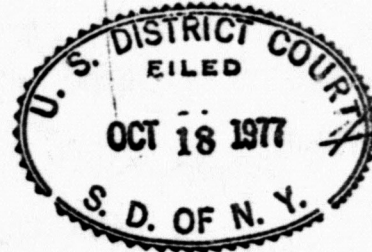

PHYLIS SKLOOT BAMBERGER

Sworn to before me this
17th day of October 1977


Notary Public

JONATHAN T. SILBERMAN
NOTARY PUBLIC, State of New York
No. 4009933
Qualified in New York County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,
Petitioners,
-against-
THE HONORABLE EDWARD LEVI, et al.,
Respondents.

75 Civ. 6000 (MEF)

MEMORANDUM

FRANKEL, D.J.

Upon petitioner's motion dated October 17, 1977,
to amend the judgment, the court has made the following change:

In paragraph 22 of the judgment, on lines 6 and 8, the word "indoor" has been changed to "outdoor." For the convenience of all concerned, the court has made and initialled the change on the original decree filed in the Office of the Clerk.

Except as thus granted, the motion to amend is denied.

It is so ordered.

Dated, New York, New York
October 18, 1977

Martin E. Frankel
U.S.D.J.

7618181977

101

LC:n

UNITED STATES DISTRICT COURT A 2911
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ex rel. LOUIS WOLFISH,
et al.,

Petitioners,

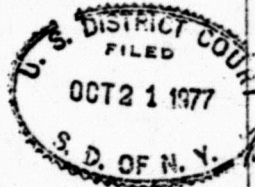
v.

HON. EDWARD LEVI, et al.,

Respondents.

NOTICE OF MOTION

75 Civ. 6000 (MEF)



S I R :

PLEASE TAKE NOTICE that upon the affidavit and memorandum submitted herewith the respondents, by their attorney Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, will move this Court on the 31st day of October 1977, or at such earlier time as this Court directs, in Room 1201 of the United States Courthouse, Foley Square, New York, New York (1) for an order, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend paragraph 22 of the partial judgment dated October 13, 1977, as amended by memorandum dated October 18, 1977, to require only indoor exercise rather than outdoor exercise (lines 6 and 8 of paragraph 22), or (2) should that request be denied, to stay, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, the provisions in paragraph 22 of the aforesaid partial judgment, as amended, for the time periods set forth in paragraph 50 of the partial judgment.

Dated: New York, New York

October 21, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for Respondents

By:

LOUIS G. CORSI

Assistant United States Attorney

A 2912

Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Tel. No.: (212) 791-1967

TO: PHYLLIS BAMBERGER, ESQ.
LEGAL AID SOCIETY
Room 509
United States Courthouse
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES ex rel. LOUIS WOLFISH,
et al.,

Petitioners,

v.

HON. EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 (MEF)

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

LARRY F. TAYLOR, being duly sworn, deposes and
says:

1. I am the Warden of the Metropolitan
Correctional Center, and as Warden I am responsible for the
over-all operations at the Metropolitan Correctional Center.
I submit this affidavit in support of the respondents'
motion to amend the partial judgment dated October 13, 1977,
as amended, or should that request be denied, for a stay.

2. Paragraph 22 of the partial judgment, as
amended, requires that the MCC provide every inmate in
administrative detention status with the opportunity for one
hour of outdoor exercise every day. In the event this
opportunity is not provided, paragraph 22 requires that the
inmate be informed in writing, by the Chief Correctional
Supervisor, an Associate Warden or the Warden of the reasons
for not being provided with that opportunity.

3. As of September 25, 1977, the quarterly
roster at the MCC changed; on or about September 9, 1977 a
copy of the proposed change was submitted to the union at the
MCC for its review and approval, as required by past practice.
(See Taylor Affidavit dated January 19, 1976, ¶ 19.) That
roster was approved by the union and went into effect on
September 25. As part of that changed roster,

LC:n

A 2914

we provided for and assigned another correctional officer to the 9-South unit during the day shift (8:00 a.m. to 4:00 p.m.), Monday through Friday; thus, since September 25, that unit which houses inmates in administrative detention (among others) has had a second correctional officer on the day shift (compare Opinion at 105) whose primary responsibility is supervision of inmates in administrative detention as well as those in disciplinary segregation.

4. Because inmates in administrative detention represent a serious threat to the safe and orderly operation of the institution it is also necessary to separate them from the general population while they are exercising. In order to provide this exercise outdoors (on the roof) an extra expenditure of staff time is required for escort service and supervision. With the additional staff member assigned to 9 South as of September 25, the MCC is now able to provide persons in administrative detention with an opportunity for one hour of outside recreation, Monday through Friday; on weekends, a one hour indoor exercise period is provided each day. This practice, in our view, exceeds minimum requirements set forth in the Bureau policy statement.

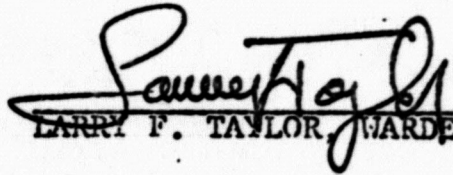
5. In order to provide outdoors exercise seven days a week for persons in administrative detention, it would be necessary to assign yet another position to the 9-South unit. Limitations of staff, and the normal reduced staffing patterns on weekends, makes it extremely burdensome and unduly expensive to provide such coverage for this function seven days a week. In this context, we believe that it is important for institution administrators to retain flexibility in allocating positions and resources in order

10:01
10:01

A 2915

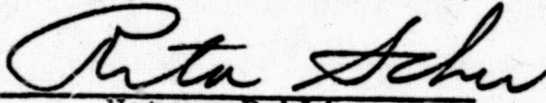
to balance the demands made on limited resources.

6. It is therefore requested that the Court grant the relief set forth in the notice of motion.


LARRY F. TAYLOR, WARDEN-MCC NY

Sworn to before me this

21st day of October 1977.



Notary Public

"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 2916

UNITED STATES ex rel.
LOUIS WOLFISH, et al.,

Relators,

-v-

EDWARD LEVI, et al.,

Respondents,

AMENDED
NOTICE OF APPEAL

75 Civ. 6000 (MEF)

Filed
10/31/77

S I R S :

PLEASE TAKE NOTICE that the Respondents hereby
appeal to the United States Court of Appeals for the Second
Circuit from each and every part of the Opinion dated
September 15, 1977, the Memorandum dated October 28, 1977
and the Partial Judgment entered October 13, 1977, as amended
by Memorandum filed October 18, 1977, in the above-captioned
action.

Dated: New York, New York

October 31, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Respondents

By: *Luis Corsi*
LOUIS G. CORSI
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1967

:AMM

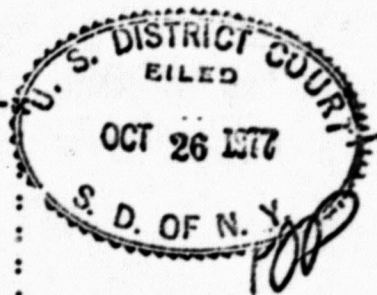
A 2917

TO: LEGAL AID SOCIETY
Criminal Appeals Bureau
United States Courthouse
Foley Square
New York, New York 10007
Attn: Phylis Skloot Bamberger, Esq.

CLERK
U. S. Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

A 2918

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI;
NORMAN A. CARLSON, Director,
United States Bureau of Prisons;
and LARRY TAYLOR, Warden,
Metropolitan Correctional Center,
et al.,

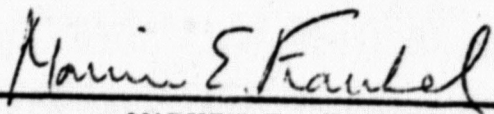
Respondents.

ORDER

75 Civ. 6000 MEF

The respondents having filed with this Court a letter dated October 14, 1977, requesting an amendment to Paragraph 50(a) of the order and judgment of this Court dated October 13, 1977; and the Court having considered the request; it is hereby ORDERED, that the proposed amendment to the order and judgment of this Court dated October 13, 1977, is denied.

Dated: New York, New York
October 25, 1977


MARVIN E. FRANKEL
United States District Judge

To: Louis G. Corsi, Esq.
Assistant United States Attorney
Southern District of New York

A 2919

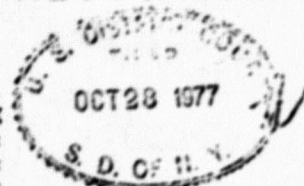
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKUNITED STATES ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-v.-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT
IN
OPPOSITION

75 Civ. 6000 (MEP)

STATE OF NEW YORK }

COUNTY OF NEW YORK }

ss.:

PHYLIS SKLOOT BAMBERGER, being duly sworn, deposes and says:

I am Attorney-in-Charge of The Legal Aid Society, Federal Defender Services Appeals Unit, which is attorney for the petitioners herein. I make this affidavit in opposition to the Government's motion to amend the judgment dated October 21, 1977. Petitioners will rely on the affidavit and memorandum of law filed in support of a motion to amend the judgment. Petitioners further note that the respondents' request for relief is inconsistent with the assertion of Warden Taylor in his affidavit that the Metropolitan Correctional Center staff can provide one hour of outdoor activity at least five days a week without any staff changes.

WHEREFORE, it is respectfully requested that the Government's motion to amend the judgment be denied.

PHYLIS SKLOOT BAMBERGER

Sworn to before me this
28 day of October 1977.

Notary Public
New York

Commission Expires March 30, 1978

A 2920

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

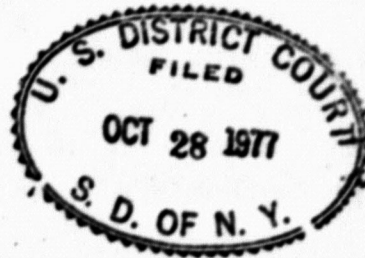
UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI, et al.,

Respondents.



75 Civ. 6000 (MC)

MEMORANDUM

FRANKEL, D.J.

Respondents move to amend the partial judgment by changing it again to provide in paragraph 22 for only "indoor" rather than "outdoor" exercise for people in administrative detention.

This subject has a slightly regrettable history. Rightly or wrongly, the court made clear in its opinion that the judgment in this respect, enforcing what was deemed to be the purport of respondents' own regulations, would provide for outdoor exercise. Respondents made no motion to amend or reargue that portion of the decision. Instead, they merely submitted a proposed partial judgment that changed "outdoor" to "indoor." The court originally (and erroneously) adopted that provision along with a substantial portion of respondents' proposed partial judgment, which was and is deemed on the whole to have been superior to the version submitted by petitioner. This was corrected on October 18, 1977.

MICROFILM

OCT 28 1977

Notwithstanding that history, the court has again reconsidered. Respondents' own papers make clear now that at least five days of outdoor exercise are entirely feasible for people in administrative detention. The picture is uncertain as to the other two days of the week. Respondents' own regulations provide for deviations based upon "compelling reasons." The regulations also demonstrate the feasibility of "documentation" when compelling necessities require departures from regular practice. It appears, in sum, that the questioned portion of the partial judgment is perfectly manageable by respondents in whatever eventualities they appear to anticipate. Moreover, the respondents, contrary to the letter and spirit of the court's opinion, seem to regard administrative detention as a condition that will persist for long periods of time. This, it is hoped, will be seen as a misconception.

Reviewing the several considerations, and affirming again that a decent amount of discretion is left to respondents by the partial judgment as it has been formulated, the request for an amendment is denied. The accompanying request for a stay is also denied.

It is so ordered.

Dated, New York, New York
October 28, 1977

Martin E. Finkel
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

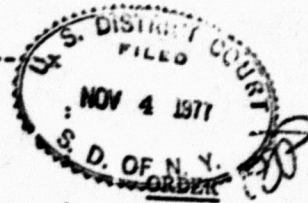
UNITED STATES ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

v.

HONORABLE EDWARD LEVI, et al.,

Respondents.



75 Civ. 6000 (MEF)

WHEREAS, the respondents have moved before the Court of Appeals for a stay of inter alia the provisions of paragraph 8 of the partial judgment entered on October 13, 1977 in this action, and

WHEREAS, the next regularly scheduled date for the hearing of that motion before the Court of Appeals is November 15, 1977, and

WHEREAS, pursuant to paragraph 8, the respondents are required to achieve compliance with the provisions thereof no later than the end of November 13, 1977, and

WHEREAS, a stay of the provisions of paragraph 8 to and through the end of the November 15, 1977 date is appropriate in order to allow the Court of Appeals to hear the parties on the respondents' motion for a stay,

NOW, THEREFORE, upon the application of the respondents, having heard the parties on this application, and pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, it is

ORDERED, that the provisions of paragraph 8 of the partial judgment entered on October 13,

MICROFILM

NOV 4 1977

LGC:n

A 2923

1977 are hereby stayed up to and through the end of
November 15, 1977.

Dated: New York, New York

November 4, 1977

Marvin E. Frankel

MARVIN E. FRANKEL

United States District Judge

A 2924



ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF NEW YORK

ONE ST. ANDREW'S PLAZA

NEW YORK, NEW YORK 10007

NOV 11 1977

LGC:gdd

October 14, 1977

BY HAND

Hon. Marvin E. Frankel
United States District Judge
United States Courthouse
Room 1201
Foley Square
New York, New York

Re: United States ex rel Wolfish v. Levi,
75 Civ. 6000(MEF)

Dear Judge Frankel:

This letter is in reference to the partial judgment in the above captioned action which was entered on October 13, 1977.

Pursuant to the stay granted in paragraph 50 of that judgment, the respondents may house more than 449 inmates at MCC, should the need arise, during the time that the stay with respect to paragraph 9 of the partial judgment is in effect. It appears, however, that the Court did not stay the provisions of paragraphs 7 and 8 of the partial judgment which prohibit the respondents from housing more than 10 inmates in each dormitory room or housing any inmates in commons areas. Although paragraphs 7 and 8 have grace periods of 60 and 30 days, respectively, the effect of not staying those provisions is that after the expiration of the grace periods the respondents will not be permitted to house more than 449 inmates at the MCC (despite the stay with respect to paragraph 9) since it will not be permitted to house more than 10 inmates in the dormitory or temporarily house any inmates in the commons areas.

A 2925

Hon. Marvin E. Frankel

-2-

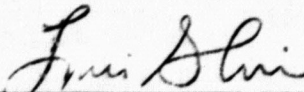
October 14, 1977

We request that the Court advise the parties whether, by staying paragraph 9, the Court intended to permit the respondents to continue to house more than 10 inmates in the dormitory rooms, or temporarily house inmates in commons areas once the grace periods in paragraph 7 and 8 expire. In this regard, we would urge the Court to permit this while the stay of paragraph 9 is in effect. If the Court determines that request to be unacceptable, we would request that the Court extend the stay to include at least paragraph 7 regarding the capacity of the dormitory.*

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney

By:



LOUIS G. CORSI
Assistant United States Attorney
Tel.: 791-1967

cc: Phyllis Bamberger, Esq.
Legal Aid Society
Room 509
United States Courthouse
Foley Square
New York, New York

* In reviewing the judgment, we have noted that the proposed form of judgment submitted by respondents (and generally adopted by the Court) failed to provide that the schedule for implementing paragraph 9 would be consistent with the grace periods in paragraphs 7 and 8. We would request the court and counsel for petitioners to interpret paragraph 9 in a manner consistent with paragraphs 7 and 8, i. e., that the MCC would be required to maintain an inmate population of 449 or less beginning 60 days after the date of entry of this judgment.



A 2926
THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Federal Defender Services Unit
United States Court House
Foley Square — Room 509
New York, N. Y. 10007
(212) 732-2971

PHILIP SKLOOT BAMBERGER, Attorney-in-Charge

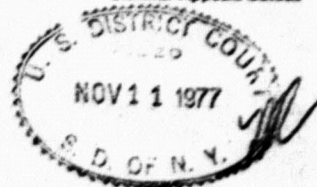
HAROLD H. HEALY, JR.
Chairman of the Board

ROBERT B. MCKAY
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Chief

WILLIAM E. HELLERSTEIN
Attorney-in-Charge
Criminal Appeals Bureau

October 17, 1977



The Honorable Marvin E. Frankel
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: WOLFISH v. LEVI, 75 Civ. 6000 *MEH*

Your Honor:

This letter is in response to the Government's letter of October 14, 1977, seeking to resettle the order of October 13, 1977.

The Government's request to stay the effective date of paragraphs 7 and 8 of the order should be denied. The Court adopted the language of paragraphs 7, 8, and 9 as drafted by the Government. A stay of paragraph 9 is perfectly consistent with the grace periods permitted under paragraphs 7 and 8. If paragraphs 7 and 8 are complied with within the grace periods, by the time paragraph 9 becomes effective, there will be no need to delay its impact. Accordingly, the order should not be modified.

Filed with this letter is a formal motion to resettle the order. The motion seeks changes in paragraphs relating to classification, length of stay, overcrowding, administrative detention, and notice. It is necessary to proceed in this manner since petitioners were unable to file a response to the Government's counter proposal. On the assumption that the procedure followed earlier in this case would permit petitioners to file a response to the counter proposal, which was not received until late in the day on October 11, counsel for petitioners planned to file a response. However, before being able to do so, we were

125

The purpose of the Society is to render legal aid in the City of New York to persons who are without adequate means to employ other counsel. — By-laws of The Legal Aid Society.

A 2927

The Honorable Marvin E. Frankel
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: WOLFISH v. LEVI, 75 Civ. 6000

October 17, 1977

2

advised that the final order had been signed and filed some time early on October 13. Accordingly, we had no opportunity to state our objections to portions of the counter proposal which are absolutely inconsistent with the opinion of this Court. The memorandum of law accompanying the motion includes our objections and alternate proposals.

Respectfully submitted,

Phylis Skloot Bamberger / per D.J.G.

PHYLIS SKLOOT BAMBERGER
Attorney-in-Charge

PSBbc

cc: Louis G. Corsi, Esq.
Assistant United States Attorney
Southern District of New York

Protective Order A 2928

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

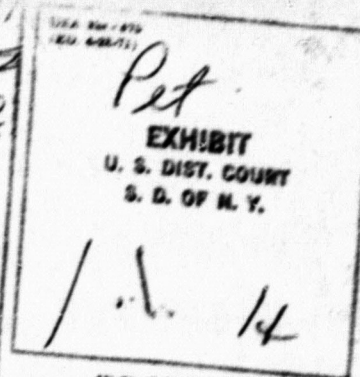
-against-

THE HONORABLE EDWARD LEVI, Attorney
General of the United States;

NORMAN W. CARLSON, Director, United
States Bureau of Prisons; and

LARRY TAYLOR, Warden, Metropolitan
Correctional Center, New York City,
et al.,

Respondents.



ORDER TO SHOW CAUSE

75 Civ. 6000 MEF

Upon the amended petition, the prior proceedings in this case, the annexed affidavit of Michael Young, and the other exhibits annexed hereto, it is hereby

ORDERED, that the respondents show cause before this Court in Room ____ of the United States Court House, Foley Square, New York, New York, on _____, 1977, at ____ : ____ .M.:

(1) Why a preliminary injunction in the form of a protective order should not be issued, pursuant to Rule 65 of the Federal Rules of Civil procedure, enjoining respondents, their agents, and employees from harassing, intimidating, threatening, and/or physically or verbally abusing petitioners or petitioners' named witnesses because of the above-captioned case and their participation in that lawsuit, and more specifically:

(a) enjoining respondents from housing petitioners' named witnesses under conditions, restrictions, custody statuses, or work requirements that are worse than the conditions under which they were housed at MCC prior to their involvement in this case;

A 2929

(b) enjoining respondents from re-designating petitioners' named witnesses from their previously designated institutions to other institutions, particularly closer custody institutions, while they are at MCC for purposes of participating in this case;

(c) enjoining respondents from denying petitioners' named witnesses any visiting rights or privileges they enjoyed previous to their involvement in this case; and

(d) enjoining Case Manager Swanson (Fifth Floor) from verbally threatening petitioners' named witnesses, interfering with their mail, or otherwise harassing them; and

(2) Why a preliminary injunction should not be issued herein, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining respondents, their agents, and employees, from following their newly instituted policies of locking the residents of the modular unit on Five North and the protective custody unit in their rooms between the hours of 11:00 p.m. and 6:00 a.m. and, from locking the residents of the dorm unit (Eleven South) into their dormitory rooms between approximately 8:00 a.m. and 10:00 a.m. every day; and

(3) Why a preliminary injunction should not be issued, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining respondents from transferring federal pretrial detainees or sentenced prisoners from MCC to state facilities, such as Nassau County Jail, or transferring any petitioners to undesirable facilities in order to eliminate double-celling at MCC; and it is further,

ORDERED, that personal service of this order upon the U.S. Attorney by February ____, 1977 by __: __ M. is sufficient.

Dated: New York, New York
February __, 1977

MARVIN E. FRANKEL
United States District Judge

A 2930

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

THE HONORABLE EDWARD LEVI, Attorney
General of the United States;

NORMAN J. CARLSON, Director, United
States Bureau of Prisons; and

LARRY TAYLOR, Warden, Metropolitan
Correctional Center, New York City,
et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }

COUNTY OF NEW YORK }

ss.:

MICHAEL YOUNG, being duly sworn, deposes and says:

I am an attorney, of counsel to the Federal Defender Services Unit of The Legal Aid Society which has been assigned by this Court to represent the petitioners in this proceeding. I make this affidavit in support of an application for an order to show cause why this Court should not enter preliminary injunctions relating to harassment, lock-ins, and transfers, the particulars of which are specified in the order itself.

Facts Relevant to Harassment

We have refrained in the past from bringing to the Court's attention instances of harassment of the petitioners who have assisted us in the preparation of this case. However, the unrelenting barrage of harassment and intimidation to which virtually all of our named inmate witnesses have been subjected by the respondents and their employees over the weeks just prior to the February 28th trial date in an apparent attempt to dissuade them from testifying at the trial and/or to make them an example to other inmates, compels us to seek an order for their protection.* Although in the following paragraphs, I have segregated out and separated specific instances of harassment for purposes of clarity, the conduct described demonstrates that there is a pattern of behavior which is intended and which has cumulative effect. The result is to induce apprehension and tension in the witnesses subjected to these conditions, as well as fear of involvement in this suit by the other petitioners who witness this treatment.

1. On December 23, 1976, the day after Your Honor toured MCC to observe double-celling, Michael Gardner, an inmate who has been working with me for some time and who is a named witness in this case, approached Case Manager Swanson to request medical treatment for another inmate who was in considerable

*In this case, the issue of witness harassment is particularly sensitive. Because of the relatively transitory nature of MCC, and the length of time it has taken to bring this case to trial, most of petitioners' named witnesses were transferred out of MCC, and have returned here only because of my request that they do so in order to testify in this case. Most of the remaining named witnesses would have been transferred out by now but have agreed at my request to remain here to help me collect information and prepare for trial.

Consequently, unlike most prison conditions cases, none of the named witnesses in this case will benefit in any way from any improvements in MCC which may result from their participation in this case. Rather, all will be transferred out of the institution soon after the completion of the trial. These witnesses have thus voluntarily returned to respondents' custody for purposes of this case. For respondents to take advantage of these unique circumstances by harassing petitioner witnesses as hereinafter described is particularly reprehensible.

pain. After refusing to call for medical aid, Mr. Swanson stated to Mr. Gardner:

"Judge Frankel was in the building yesterday. You better have him around seven days per week, you'll need him to watch your back if you continue with this bullshit suit. We have ways of handling trouble makers like you."

This incident is confirmed by affidavits of Paul Rogers, Michael Gardner, James Heimerle, Louis Marcus, William Hightower, William Sherman, and Victor Cumberbatch, attached hereto as Exhibit A.

2. Michael Gardner, who will be a witness, has been re-designated from the prison farm at Allenwood to the Federal facility at Danbury, an institution where respondents know Mr. Gardner's life will be in serious danger. In January, 1977, Michael Gardner was advised by his unit manager that he had been designated to Allenwood, and could go there immediately if he so desired. The fact of this designation is confirmed by the attached letter from Norman Carlson to Congressman Koch (Exhibit B) which states:

After reviewing this case, we are authorizing the transfer of Mr. Gardner to Allenwood. Since he is currently at the Metropolitan Correctional Center in New York on a writ, we have instructed the staff there to transfer Mr. Gardner to Allenwood as soon as the court proceedings are completed.

This designation was made by the Bureau of Prisons after respondents and their agents were repeatedly advised that Mr. Gardner was not to be designated to Danbury Federal Correctional Institution because his life would be in danger there. Thus, in his Judgment and Commitment Order, Judge Pierce, Mr. Gardner's sentencing judge, specifically stated that Mr. Gardner should "not be confined in Danbury Correctional Facility" (Exhibit C). Similarly, Mr. Gardner's sentence computation sheet, located in his folder at MCC, also plainly states that he is not to be confined at Danbury (Exhibit D). The reasons for keeping Mr. Gardner out of Danbury are set forth in a January 5, 1977 memorandum from Abe Rivera, Unit Manager at MCC to Helise Harrington, the MCC designations officer (Exhibit E). According to that memorandum, Mr. Gardner was originally not to be

A 2933

sent to Danbury because he was to be separated from one Seymour Pollack, against whom Gardner had been the main witness at trial. However, Bureau personnel subsequently provided a second compelling reason not to transfer Mr. Gardner to Danbury, regardless of whether Mr. Pollack was still there. As Mr. Rivera explained to Ms. Harrington (Exhibit E),

Apparently the unit manager at Danbury when notifying Pollack of the reason for his Central Monitoring Designation mistakenly informed Pollack in writing of the reason, that Gardner and Pollack were to be separated. Photocopies of this notification was [sic] obtained by Pollack...

A copy of that mishandled memorandum from the unit manager to Mr. Pollack is attached hereto as Exhibit F. As Mr. Rivera further explained (Exhibit E), Pollack circulated copies of that memorandum to his friends at Sandstone, where Mr. Gardner was then housed, thereby endangering Mr. Gardner's life and necessitating his redesignation to Allenwood. Clearly, the same memorandum has been circulated among Pollack's friends at Danbury where Pollack is housed, or at least was housed when he got that memorandum. Thus, Mr. Gardner's life would be in grave danger if he were ever to be transferred to that institution.

On February 1, 1977, I registered several complaints with respondents' counsel concerning harassment of petitioners' proposed witnesses, particularly Mr. Gardner. Warden Taylor responded to these complaints on February 2, 1977 through his counsel, advising me that despite the events just described, Mr. Gardner had been designated to Danbury and an immediate transfer was desired by the warden. I objected to the transfer on the ground that Mr. Gardner, as a witness in this case, should remain at MCC* and that in any event Mr. Gardner had been designated to Allenwood, not Danbury. Nevertheless, when the transfer list was posted that afternoon Mr. Gardner's name and the design-

*I have been assured by respondents' counsel that I would be advised of any intention by respondents to transfer any named witness out of MCC sufficiently in advance of that transfer to enable me to seek an order from the court if I needed to keep that witness at MCC.

A 2934

nation "Danbury" had been printed on it and then crossed out (Exhibit G).

When Mr. Gardner complained to Warden Taylor concerning this redesignation, the Warden responded:

I have received your February 8th note concerning your designation to Danbury.

I'm fully aware of the correspondence exchanged between Mr. Carlson and Congressman Koch. I'm also familiar with your separation problems [separation from Pollack].

As I've previously indicated, the change in your designation comes from our Central Office. They have been advised of your concerns but thus far, we have had no changes on your destination. As of this time, we plan to move you to Danbury once your involvement in pending litigation is terminated.

(Exhibit H)

I have reason to question the accuracy of the last paragraph of the Warden's response, since I personally called the Central Designating Office in Washington on February 3, 1977, to inquire as to Mr. Gardner's redesignation. I was advised that the Central Office had not redesignated Mr. Gardner. When I stated that Mr. Gardner had been advised that he had been redesignated, I was informed that MCC has the authority to redesignate, and that any redesignation had therefore been done by MCC staff.

Regardless of which respondent (Taylor or Carlson) effectuated this redesignation, however, the blatant nature of this particular instance of harassment is exceeded only by the chill of its potential ramifications. Mr. Gardner was advised that he could go to Allenwood in January. Since he elected to remain here to testify in this case, he is being punished for that decision by being redesignated to an institution which is not only closer custody, but one which poses a serious threat to Mr. Gardner's safety, a fact of which respondents were fully cognizant when they made the redesignation.

3. Another of petitioners' named witnesses, John Parker (Government alias) has been in deadlock since ^{January 27,} ~~January 3,~~ 1977.

A 2935

Although Mr. Parker was originally deadlocked because of his involvement in a fight, that ceased to be the basis for his confinement on or about February ³~~2~~, 1977.* Since then, I have been advised by respondents' counsel that Mr. Parker is being kept in deadlock because MCC officials believe that there is a "threat" to him from other persons housed in his unit. The exact nature of this alleged "threat" has never been defined, nor have the persons allegedly posing that threat ever been identified. Moreover, I have interviewed numerous persons concerning this allegation, and have found no support for it. Indeed, even the person with whom Mr. Parker had the fight on ~~February 2~~^{January 31}, 1977, has written to me, confirming that there is no threat to Mr. Parker in his unit. (A copy of this letter is attached hereto as Exhibit I.) As Mr. Toth explains:

As I understand it, Mr. Parker remains in [deadlock] because Institutional Officials say there have been threats on his life voiced by other inmates on Unit 3.

I am on amiable terms with all the other inmates on Unit 3 and have asked them their opinion of Mr. Parker as a fellow inmate. There were no feelings of animosity expressed and if [sic] at worst, only indifference.

(Exhibit I).

Even if such a threat did exist, however, it is ludicrous to use that as a justification for deadlocking the intended victim.

Mr. Parker, incidentally, is the inmate whose room in the third floor unit Your Honor inspected and to whom Your Honor spoke briefly during your December 23, 1976, tour. Mr. Parker is now being held in isolation in that same room with its musty odors and cold air vent 24 hours a day, except for periodic visits and infrequent showers. Such prolonged isolation would adversely affect any person so confined. The tension, frustra-

*Every person with whom I have spoken concerning this fight is of the opinion that Mr. Parker did not initiate it. Despite this fact, the institutional disciplinary committee, on or about February ~~30~~³⁰, 1977, found him guilty of fighting, and sentenced him to the time he had already served in deadlock. Since that time, his isolation has been based solely on the claim of a "threat" against him.

tion, and despair which I have observed in Mr. Parker during our most recent interviews is a matter of serious concern to me.

In the context of the approaching trial and the harassment of other witnesses, the imposition on Mr. Parker of this prolonged period of isolation based on such a dubious justification is clearly more than mere coincidence. In addition to preventing Mr. Parker from observing the conditions about which he is expected to testify, the adverse effects of such isolation may well prevent Mr. Parker from being physically and mentally able to serve as a witness. Moreover, since Mr. Parker is the only person on his unit who is a named witness in this suit, and is the only person in deadlock, his confinement provides a clear signal to other inmates as to what they may expect if they assist the petitioners in this action.

4. Another named witness, Susan Braunig, has been subjected almost daily to subtle and overt forms of harassment. Ms. Braunig was transferred from MCC to Alderson in late fall 1976. There she was designated minimum custody and was advised that she would be re-designated to community custody on February 13, 1977, and would be transferred to a halfway house no later than July 1977.

Ms. Braunig agreed to be brought back to MCC to testify in this case. On or about January 16, 1977, she was taken from Alderson by United States Marshals, was shackled at the wrists and waist despite her minimum custody designation, and began her journey to New York (see affidavit of Susan Braunig, Exhibit J).

Although the trip from Alderson normally takes one day or two days at most, Ms. Braunig's took four days, with stopovers each night in small, insanitary county jails. Despite her minimum custody classification at Alderson, at MCC she was designated close custody. This reclassification will interfere with the furlough and halfway house eligibility she would have enjoyed had she remained at Alderson. Although there were openings for typists at MCC -- similar to the work she had done ^{as the warden's clerk} at Alderson -- here she was assigned to kitchen sanitation. Moreover, she is

being required to work seven days a week and has been advised by her caseworker, Mr. Swanson, that, unlike other inmate workers, she will not receive any "good" days or "meritorious" pay for her work. She has been advised by unit personnel that they have been instructed to keep her busy eight hours a day. Moreover, when she objected to her work load, she was told that the question of whether she had to work seven days a week would have to be "left up to Judge Frankel." (See Exhibit K at 8.)

Perhaps the most blatant form of harassment to which Ms. Braunig has been subjected has been the denial of her requests for joint visits with Michael Gardner, another inmate at MCC and a named witness in this case. Although Mr. Gardner is legally married to someone else, he and Ms. Braunig were living together continuously for approximately four years prior to their incarceration. When they were both previously at MCC, they were permitted periodic visits with each other, even after their trials were concluded. (See, e.g., Exhibit O.) Now, however, their requests for visits are being uniformly denied. Indeed, even joint visits with attorneys other than myself have been repeatedly denied. Not only is the denial of these joint visits totally illogical, it is also interfering with their ability to prepare certain applications, such as Rule 35 motions, a \$2255 application, and several civil actions in which they are proceeding pro se and in which Mr. Gardner, being more knowledgeable about the relevant law, is advising Ms. Braunig.

Ms. Braunig and Mr. Gardner have also been subjected to a variety of other forms of harassment which are described in their affidavits (Exhibits K, L, M).

5. Another named witness, Albert Victory, has also been subjected to harassment since his return to MCC, principally by interference with his visits and with his work on proposed New York State parole legislation. The details of this harassment are described in Mr. Victory's affidavit (Exhibit N). The conduct of respondents focuses primarily on denial of visits to Mr. Victory from Susan Black. Ms. Black is an associate director of

A 2938

the Long Termers Legislative Task Force under Senator Garcia. Mr. Victory has also been working with the Task Force and Ms. Black to re-draft the parole laws relating to convicts sentenced to long terms of imprisonment. Ms. Black has also been working with Mr. Victory and his attorneys in efforts to overturn his state conviction. Thus, the two have serious professional and legal ongoing activities, although they are also personal friends.

For most of the time Mr. Victory was at MCC, and all of the time he was subsequently at Greenhaven State Prison, he was permitted to have legal visits with Ms. Black. Respondents have, however, now permanently barred Ms. Black from visiting Mr. Victory at MCC. The alleged reason for this prohibition is that Ms. Black attempted to "sneak" a pair of bedroom slippers into MCC for Mr. Victory as a Thanksgiving present. MCC officials remain unperturbed by the inconsistency between the permanent bar on Ms. Black's visits for this act and the fact that Mr. Victory now legally possesses the same slippers at MCC, having brought them with him to MCC when he recently returned from Greenhaven.* The denial of visits between Mr. Victory and Ms. Black is, as respondents are well aware, seriously interfering with both their professional work and their personal relationship.

Mr. Victory's other visitors, including his sister Roxana Guarriello and a friend, Rolando Terrelli, have both been harassed in various ways set forth in Mr. Victory's affidavit. Another visitor, Mr. Victory's nephew, Edward Lynch Guarriello, was denied a visit altogether.

*Respondents claim that Ms. Black is also being barred from visiting because of two other charges. One was that she was so bold as to kiss Mr. Victory in the visiting room, an activity apparently permissible for all inmates and their visitors except Mr. Victory and Ms. Black. Second, respondents claim that Mr. Victory and Ms. Black are suspected of having smoked grass during a visit, an accusation unsupported by any evidence and for which no incident report was filed, no hearing held, and no disciplinary action taken.

Conclusion on Harassment

The foregoing is sufficient to establish that the respondents are engaged in a pattern of conduct aimed at harassing the inmates who are attempting to improve conditions at MCC by participating in this case.

Furthermore, the two following sections on lock-ins and transfers, while treated as separate issues, are further indicia of the respondents' behavior and are part of the pattern complained of in these papers.

Prison conditions cases are uniquely conducive to such harassment, in that the party being sued is the custodian of the complainants. Consequently, the Court should be particularly sensitive to this issue, and recognize that even subtle actions, when repeated on a daily basis, can become tortuous.

Through their actions, respondents endanger petitioners' ability to proceed with this case. A protective order is both necessary and proper under these circumstances. See e.g.

Inmates of Attica v. Rockefeller, 453 F.2d 12

(2d Cir. 1971). Petitioners respectfully urge that the Court grant the requested order.

Facts Relevant to the Lock-ins

Until approximately three weeks ago, persons confined in the protective custody unit and the Five North modular unit (sentenced men) were not locked into their rooms at night.

I have been advised by respondents' counsel and by persons confined in these units that respondents now lock these individuals into their rooms at night, generally between 11:00 p.m. and 6:30 a.m.

Respondents' counsel has stated that the practice of locking persons in their rooms at night on Five North was made necessary because respondents had begun housing persons of

A 2940

closer custody status in that unit.

However, I have been advised by petitioners housed in that unit that persons of all levels of custody, including medium and close custody status, have always been housed in that unit. Petitioners are prepared to establish this at a hearing if required to do so.

Moreover, I have personally observed a Lieutenant instruct the MCC staff member in charge of assigning new arrivals at MCC to housing units not to house any of those new arrivals on Five North.

It can be concluded that the new practice of "locking in" persons housed on Five North does not appear to have been motivated by the justifications advanced by respondents. Rather, it appears to be motivated by the statement in this Court's summary judgment decision noting that sentenced prisoners in the cadre at MCC (which includes Five North), "perhaps oddly, have more freedom than those awaiting trial" in terms of lock-in periods. (Id. at 8) Clearly the sentenced prisoners are now being locked in so as to prevent petitioners from arguing that the prior practice of not locking sentenced prisoners in at night should be extended under due process and equal protection to pre-trial detainees.

Respondents' counsel has stated that the practice of locking persons into their rooms in the protective custody unit was motivated in part by a fight which occurred in that unit at 3:00 a.m. on ~~February 2nd~~ ^{Jan 27, 1977}, and in part by complaints of residents of that unit as to late night noise in the commons area.

Both the fight and the noise mentioned above were the direct product of respondents' failure to have an officer stationed in the protective custody unit between midnight and 8:00 a.m. I have been advised by the petitioners housed in that unit that an officer has now been permanently assigned to that unit during that time period. Consequently, there is no justification for also locking inmates into their rooms during that period.

A 2941

Similarly, approximately three weeks ago, respondents began locking residents of the Eleven South modular unit in their dormitory rooms between approximately 8:00 a.m. and 10:00 a.m. I have been advised that this practice was initiated to induce the residents of this modular unit to clean up their dormitory rooms during that period. Since each dormitory room, originally designed to house nine persons, now houses between 18 and 20 persons, the crowding of those persons into that space for two hours each morning not only makes it virtually impossible to clean the dormitory rooms during that period, but is unpleasant and uncomfortable for the persons so confined.*

That the lock-in practices complained of here are changes for the worse is confirmed by the large number of inmates in those units who have complained to me concerning the practice, and the fact that the lock-ins are prima facie a closer form of custody.

Petitioners respectfully submit that these lock-ins constitute "changes for the worse in [an] already contested situation" which should be enjoined pending litigation of this issue in the upcoming trial. United States ex rel. Wolfish v. Levi, 406 F. Supp. 1243, 1249 (S.D.N.Y. 1976).

*The implication of the respondents' position is that the dormitory is dirty because the people housed there are dirty. Considering the severe overcrowding of the dormitory rooms, the failure of respondents to reduce the size of the population as a cause of the conditions is reflective of the traditional anti-semitic and anti-black statements that those who live in severely overcrowded ghettos with inadequate sanitary facilities are inherently dirty people.

A 2942

Facts Relating to Transfer of Inmates

When the parties were settling the summary judgment order, respondents urged the Court to delay enforcement of the ban on double-celling for sixty days, assuring the Court that

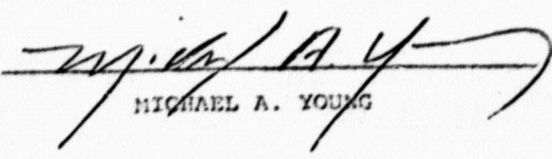
...we anticipate that within 60 days, the sentences of a sufficient number of cadre will expire to permit compliance with the ban with only a minimal amount (if any) of inmate transfers out of MCC for that purpose.

Respondents' letter to the Court on January 13, 1977 at 1.

This Court, apparently persuaded by this assurance, granted the sixty day delay over the objection of petitioners.

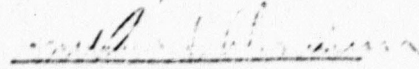
Contrary to this assurance, respondents have been shipping out petitioners by the busloads. For example, approximately two weeks ago approximately twenty federal sentenced prisoners were transferred to Nassau County Jail. There, they are being held in maximum security under unsatisfactory and unconstitutional conditions. I am advised by the inmates who were so transferred that the institution is roach-infested, that the inmates are locked in their tier twenty-three hours a day, and that their cells have only cold water. Thus, many of the conditions which these petitioners were contesting in this lawsuit are now being imposed on them through transfer to another institution. As Judge Lasker held in Rhem such transfers are clearly not permissible in a prison conditions case. They should be proscribed in this case.

WHEREFORE, the requested orders should be issued.


MICHAEL A. YOUNG

Sworn to before me this

28 day of February 1977.


NOTARY PUBLIC

A 2943

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAUL T. ROGERS

, being duly sworn,

(Print Name)

deposes and says:

I am currently confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York.
On December 23, 1976 I was present in the day room area of unit 118 with two other inmates, Michael Gardner and Louis Marcus. At the time, Mr. Gardner was in conversation with case manager Swanson. Mr. Gardner was requesting that Mr. Swanson secure medical treatment for Mr. Marcus who was in severe pain due to a back condition. Mr. Swanson declined to call for medical assistance. Instead he turned to Mr. Gardner and declared, "Judge Frankel was in the building yesterday". He further added, "You better have him (Judge Frankel) around seven days per week, you'll need him to watch your back if you continue with this bullshit suit. We have ways of handling trouble makers like you."

Paul T. Rogers

(Signature)

Sworn to before me this
31st day of January 1977

Karen E. Aug
Notary Public

A 2944

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEY

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MICHAEL GARINER

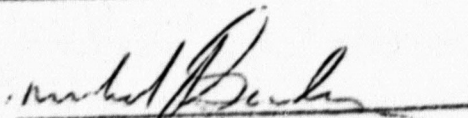
, being duly sworn,

(Print Name)

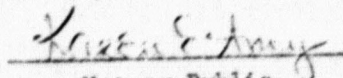
deposes and says:

I am currently confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York.

On December 23, 1976 I was present in the day room area of Unit 11-B along with several other inmates. At that time I approached a Mr. Swanson, a member of the institutional staff on duty, and requested of him that he secure immediate medical attention for another inmate, Louis Marcus. Mr. Marcus, who was also present, was in severe pain due to a back condition. Mr. Swanson refused to call for medical assistance. Instead he told me that Judge Frankel had been in the building on the previous day and told me that I would be better off if Judge Frankel came around seven days a week. When I asked him why, he told me that I would need Judge Frankel to watch my back because the institution had ways of handling trouble makers like me. To my knowledge Mr. Marcus did not receive medical attention for his back condition.


(Signature)

Sworn to before me this
31 day of January 1977


Notary Public

A 2945

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
:
UNITED STATES OF AMERICA ex rel. :
LOUIS WOLFISH, et al., :
:
Petitioners, :
:
-against- :
:
EDWARD LEVI, et al., :
:
Respondents. :
:
-----X

AFFIDAVIT

75 Civ. 6000 MEY

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAUL T. ROGERS

(Print Name)

, being duly sworn,

deposes and says:

I am currently confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York.
On December 23, 1976 I was present in the day room area of unit 11B with two other inmates, Michael Gardner and Louis Marcus. At the time, Mr. Gardner was in conversation with case manager Swanson. Mr. Gardner was requesting that Mr. Swanson secure medical treatment for Mr. Marcus who was in severe pain due to a back condition. Mr. Swanson declined to call for medical assistance. Instead he turned to Mr. Gardner and declared, "Judge Frankel was in the building yesterday". He further added, "You better have him (Judge Frankel) around seven days per week, you'll need him to watch your back if you continue with this bullshit suit. We have ways of handling trouble makers like you."

Paul T. Rogers
(Signature)

Sworn to before me this
21st day of January 1977

Harry E. Aruff
Notary Public

A 2946

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM HIGHTOWER

(Print Name)

, being duly sworn,
deposes and says:

I am currently confined in the Metropolitan Correctional Center, 139 Park Row, New York, New York.

I was present in "B" dormitory on December 23, 1976 when Louis Marcus related to me an occurrence which had just taken place with a Mr. Swanson, an institutional employee. It seems that Mr. Marcus had asked someone to go with him to Mr. Swanson to request immediate medical assistance for Mr. Marcus' back condition. I remember that the previous evening Mr. Marcus had been in severe pain. Mr. Marcus said that Mr. Swanson refused to call for medical assistance and instead made various threats to the inmate who accompanied him and derogatory comments about the inmate and about Judge Frankel. It seemed quite confused to me and it struck me at the time that there seemed to be no connection between Judge Frankel and Mr. Marcus' back.

William Hightower
(Signature)

Sworn to before me this
31st day of January 1977

Robert E. [Signature]
Notary Public

A 2947

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM SHERMAN

, being duly sworn,

(Print Name)

deposes and says:

I am currently confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York.

On December 23, 1976 I was present in "D" dormitory, unit 118 of the M.C.C. when Louis Marcus had a discussion with another inmate, William Hightower. Both Mr. Hightower and Mr. Marcus were also housed in "D" dormitory. Mr. Marcus told Mr. Hightower that he had a terrible experience with an employee, a Mr. Swanson. He (Mr. Marcus) further said that he had asked one Michael Gardner to secure medical assistance from Mr. Swanson for a problem Mr. Marcus was having with his back. Mr. Marcus said that Mr. Swanson acted very strangely and made some obscene statements about Judge Frankel and told inmate Gardner to take care of his back. He said he couldn't understand why Mr. Swanson should be concerned about Mr. Gardner's back when it was Mr. Marcus' back that was hurting. Mr. Marcus said that he could not understand all that Mr. Swanson had said but it frightened him and he didn't understand what was going on. To my knowledge, Mr. Marcus never did receive medical attention and since I was housed with him, I knew that he was in severe pain quite often.

William Sherman
(Signature)

Sworn to before me this
31 day of January 1977

Karen E. [Signature]
Notary Public

A 2948

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

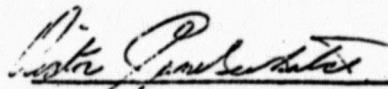
75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

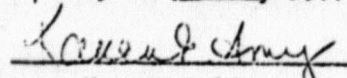
VICTOR CUMBERBATCH

_____, being duly sworn,
(Print Name)
deposes and says:

I am currently confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York.
On December 23, 1976 I was present in "K" Dormitory, unit 11 S when Mr. Michael Gardner, another inmate, came into the dormitory. Mr. Gardner is also housed in the dormitory. Mr. Gardner told me that he was worried because he had just completed a discussion with Mr. Swanson, an institutional employee. Mr. Gardner related that Mr. Swanson had threatened him with physical violence because of Mr. Gardner's activities in furthering a civil suit pending against the institution. I asked him how these threats came about and he (Mr. Gardner) related that he had merely asked Mr. Swanson to secure medical assistance for another inmate. I remember the date because I made a note of it since I feel particularly sensitive about employee's threatening inmates.


(Signature)

Sworn to before me this
19 day of January 1977


Notary Public

A 2949

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES HEIMERLE

(Print Name)

, being duly sworn,
deposes and says:

was

I ~~was~~ confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York, during the month of December, 1976. I am currently an inmate at the United States Penitentiary, Atlanta, Georgia. I was present on December 23, 1976 when Mr. Michael Gardner requested an institutional employee of the M.C.C., a Mr. Swanson, that he, Mr. Swanson, secure medical attention for inmate Louis Marcus. I distinctly recollect that Mr. Swanson made a threatening statement to Mr. Gardner...something to the effect that Mr. Gardner better watch his back with this bullshit suit and that the institution (the M.C.C.) had ways of handling troublemakers like Mr. Gardner. I remember that I was shocked and dismayed to hear Mr. Swanson speak in such a manner.

(Signature)

Sworn to before me this
10 day of January 1977

Notary Public

097

A 2950

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners,

-against-

EDWARD LEVI, et al.,

Respondents.

AFFIDAVIT

75 Civ. 6000 MEF

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LOUIS MARCUS

(Print Name)

deposes and says:

was

I ~~was~~ confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York, during the month of December, 1976. I am currently confined at the United States Penitentiary Lewisburg, Pennsylvania. I had a severe pain in my back due to an endemic condition of which I had apprised the institutional officials at the M.C.C. I was told, when I went on sick call, that if I was ever in pain, to have the floor officer call for medical ~~assistance~~ ^{assistance}, so that I could get something for the pain. On the date in question Mr. Swanson was on the floor for a short while. I asked Michael Gardner, another inmate, to accompany me when I approached Mr. Swanson since Mr. Gardner is more verbal than I. Mr. Gardner told Mr. Swanson of my condition and asked him to secure medical assistance. Several other inmates were present. Mr. Swanson sort of sneered at Mr. Gardner and said something about Judge Frankel that didn't sound nice and then told Mr. Gardner that he better take care of his back because he could get hurt here and the institution had alot of ways of taking care of troublemakers. I couldn't understand why Mr. Swanson told Mr. Gardner to watch HIS back when it was my back that hurt. I never did get medical attention for my back.

James M. Markis
(Signature)

Sworn to before me this
8 day of ~~January~~ 1977

[Signature]
(Notary Public)

Parole Officer-Authorized L,
Act of July 7, 1955, to admin-
ister oaths (18 U.S.C. 40041)

9-93

A 2951

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON 20534

January 13, 1977

Honorable Edward I. Koch
House of Representatives
Washington, D. C. 20515

RE: GARDNER, Michael S.
Reg. No. 26035-145

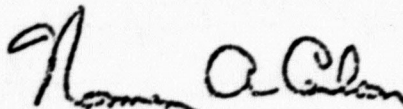
Dear Congressman Koch:

We are in receipt of your letter of December 28, 1976, and the enclosed correspondence from Mr. Gardner. In his letter, he asks for your assistance in obtaining a transfer from the Federal Correctional Institution, Sandstone, Minnesota, to the Federal Prison Camp at Allenwood, Pennsylvania.

After reviewing this case, we are authorizing the transfer of Mr. Gardner to Allenwood. Since he is currently at the Metropolitan Correctional Center in New York on a writ, we have instructed the staff there to transfer Mr. Gardner to Allenwood as soon as the court proceedings are completed.

We hope that this information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,



NORMAN A. CARLSON
Director

A 2952

United States District Court

Southern District of New York

CAPTION

MICHAEL B. GARDNER/a/k/a B.

Michael Gardner aka as Galt Gardner

DOCKET NO.

JUDGMENT AND PROBATION/COMMITMENT (EXCEPT)

In the presence of the defendant's counsel, or this date

MONTH DAY YEAR
1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☐ WITH COUNSEL

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☐ GUILTY.

FINDINGS

SUGGEST

This Court in its order dated August 6, 1976 hereby modifies the judgment of conviction dated July 7, 1976 solely to the extent indicated below.

SENTENCE

OR

PROBATION

ORDER

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on each of counts 1 through 12 inclusive to run concurrently with each other. COUNT (1) YEAR on count 13 to run concurrently with sentence imposed on counts 1 thru 12. The sentence on each of counts, counts, 1 through 13, is to run concurrently with the sentence imposed on the indictment upon which the defendant was convicted in the Northern District of Illinois.

SPECIAL

CONDITIONS

OF

PROBATION

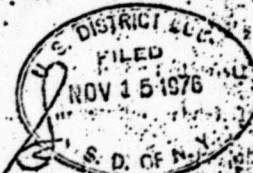
Defendant is to receive credit for time served in connection with the Northern District of Illinois sentence and defendant is to receive credit with respect to this indictment for time served since 1975, the date on which he was remanded following the jury's finding of guilty with respect to this indictment.

A TRUE COPY

RAYMOND E. BURGER, Clerk

By

Deputy Clerk



ADDITIONAL

CONDITIONS

OF

PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may suspend the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT

RECOMMENDATION

BY

The court orders commitment to the custody of the Attorney General and recommends

that defendant be committed to the custody of the Federal Bureau of Investigation

at New York.

It is ordered that the clerk of the court file a certified copy of this judgment and commitment to the U.S. Marshal or other qualified official.

CERTIFIED AS A TRUE COPY OF THIS DATE

P-103



U.S. DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

A 2953

FPI 4-78 2005 954

SENTENCE COMPUTATION RECORD

1. REGISTER NO. 26C35-1145		2. NAME (LAST, FIRST, MIDDLE) GARDNER, Michael		3. INSTITUTIONS OF CONFINEMENT IN SEQUENCE (SYMBOLS) DAN SST							
4. DATE OF BIRTH (MO., DAY, YR.) 03-13-40		5. FBI NO. 464 400 K1		6. RACE 1. WHITE 2. BLACK 3. YELLOW 1		4. RED 5. OTHER 1		7. SEX 1. MALE 2. FEMALE 1			
8. SENTENCE NUMBER 1		DOCKET NO. 73 CR-167		2		DOCKET NO. 73 CR 612		3		DOCKET NO. 76 Cr. 21	
9. DATE PREPARED OR CHANGED 10-28-76		10-28-76		10-28-76		10-28-76		10-28-76		10-28-76	
10. DATE SENTENCED 12-10-73		12-10-73		04-19-74		04-19-74		07-07-76		07-07-76	
11. DATE COMMITTED BY FOLLOWING METHOD 07-07-75		INST. SYMBOL DAN		07-07-75		INST. SYMBOL DAN		10-27-76		INST. SYMBOL SST	
12. HOW COMMITTED 101 Fed. Cr.		101 Fed. Cr.		101 Fed. Cr.		101 Fed. Cr.		101 Fed. Cr.		101 Fed. Cr.	
13. DISTRICT 02323 S/New York		02323 S/New York		07131 N/Illinois		07131 N/Illinois		S/New York		S/New York	
14. JUDGE BAUMAN, A.		BAUMAN, A.		AUSTIN, R.B.		AUSTIN, R.B.		PIERCE, L.W.		PIERCE, L.W.	
15. OFFENSE Conspiracy to Defraud the United States		Conspiracy to Defraud the United States		Possession Stolen Property		Possession Stolen Property		Tsp. Stln Secs. in I/S & Foreign Com; Mail Fraud; Wire Fraud; Fict. Name		Tsp. Stln Secs. in I/S & Foreign Com; Mail Fraud; Wire Fraud; Fict. Name	
16. BOP OFFENSE CODE											
17. SENTENCE PROCEDURE 10 Reg.		10 Reg.		10 Reg.		10 Reg.		10 Reg.		10 Reg.	
18. SENTENCE IMPOSED 844444 = LIFE 899999 = DEATH 01-00-01 1 Yr & 1 Day		01-00-01 1 Yr & 1 Day		03-00-00 3 Years Consecutive		03-00-00 3 Years Consecutive		05-00-00 5 Years Concurrent		05-00-00 5 Years Concurrent	
19. NEW TERM OF THIS SENTENCE *		*		*		*		*		*	
20. BASIS FOR CHANGE *		*		*		*		*		*	
21. FINE/COSTS: COMM. = 1 NOT COMM. = 2 *		*		*		*		*		*	
22. PROBATION: REVOKED = 1 TO FOLLOW = 2 *		*		*		*		*		*	
23. JAIL CREDIT TOTAL FROM & INCL. TO & INCL. * * *		TOTAL FROM & INCL. TO & INCL. * * *		TOTAL FROM & INCL. TO & INCL. * * *		TOTAL FROM & INCL. TO & INCL. * * *		TOTAL FROM & INCL. TO & INCL. * * *		TOTAL FROM & INCL. TO & INCL. * * *	
24. INOPERATIVE TIME TOTAL * * * *		TOTAL * * * *		TOTAL * * * *		TOTAL * * * *		TOTAL * * * *		TOTAL * * * *	
25. IDENTIFY SENTENCES INCLUDED IN FOLLOWING SENTENCE COMPUTATION(S) BY SENTENCE NUMBER(S) 1		1		1 2		1 2		1 2 3		1 2 3	
26. TOTAL TERM NOW IN EFFECT 01-00-01 1 Yr & 1 Day		01-00-01 1 Yr & 1 Day		04-00-01 4 Yrs. 1 Day		04-00-01 4 Yrs. 1 Day		06-01-21 6Yr Mo 21Days		06-01-21 6Yr Mo 21Days	
27. SENTENCE BEGAN OR WARRANT EXECUTED 05-16-75		05-16-75		05-16-75		05-16-75		05-16-75		05-16-75	
28. EXPIRES FULL TERM 05-16-76		05-16-76		05-16-79		05-16-79		07-06-81		07-06-81	
29. FULL TERM LESS 180 DAYS *		*		11-17-78		11-17-78		01-07-81		01-07-81	
30. GOOD TIME ALLOWANCE AND RATE 00072 @ 05 DA/MO		00072 @ 05 DA/MO		00336 @ 07 DA/MO		00336 @ 07 DA/MO		00590 @ 03 DA/MO		00590 @ 03 DA/MO	
31. MANDATORY RELEASE OR EXPIRES WITH GOOD TIME 03-05-76		03-05-76		06-11-78		06-11-78		11-21-79		11-21-79	
32. ELIGIBLE FOR PAROLE 855555 = NOT ELIGIBLE 866666 = BOP'S DISCRETION 09-16-75 Reg.		09-16-75 Reg.		09-16-76 Reg.		09-16-76 Reg.		06-01-77 Reg. Reg c/c		06-01-77 Reg. Reg c/c	
33. SPECIAL PAROLE TERM * YEARS		* YEARS		* YEARS		* YEARS		* YEARS		* YEARS	
34. TWO-THIRDS OR 30-YEAR DATE *		*		*		*		06-19-79		06-19-79	

Defdt Not Be Confined

A 2954

Helise Harrington
Chief Case Manager

1-5-77

Abe Rivera
Unit Manager, Unit 11

Separation of Michael Gardner #26035-145 and Seymour Pollack #40300-133

Gardner was designated to Allenwood on September 30, 1976 by this institution. The Bureau classified him as a Central Monitoring Case on that date. He was therefore brought back to the Metropolitan Correctional Center and subsequently designated and sent to the Federal Correctional Institution at Sandstone, Minnesota.

Apparently the unit manager at Danbury when notifying Pollack of the reason for his Central Monitoring Designation mistakenly informed Pollack in writing of the reason, that Gardner and Pollack were to be separated.

Photocopies of this notification was obtained by Pollack and he made them available to his friends at Sandstone in an attempt to make Gardner's situation a difficult one.

Gardner while at Sandstone sensed a coldness to him and overheard stories that he was a government informer. Therefore, he is very apprehensive at the possibility of returning to that facility as far as his well being is concerned.

UNITED STATES GOVERNMENT

A 2955

Memorandum

TO : Central File

DATE: 7-25-76

FROM : D.F. In. D-Unit Manager

SUBJECT: POLLOCK, Seymour. REG. No. 40300-133 (1)

You have been designated a Central Monitoring Case for the following reason: Michael S. Garber was the main witness against POLLOCK 40300-133 and SACKS, PAUL.

To be separated from MICHAEL S. GARBER.
REG NO. 26035-145. Presently confined at Allenwood.

I have received in writing the reason - how designated a Central Monitoring Case.

Sen. Pollock

DATE

July 25, 1976

DATE



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

P-104

TRANSFER NOTICE
U. S. BUREAU OF PRISONS

A 2956

TO: All of us concerned
FROM: RECORDS OFFICE

NEW YORK, NEW YORK 10007
LOCATION
THURSDAY, FEBRUARY 3, 1977
DATE

The following will depart in transfer to the destinations indicated on 02-03-77 at 6:00 AM. Records for transfer should be in the Record Office by 5:00 PM on 02-02-77.

REGISTER NO.	NAME (LAST, FIRST, MIDDLE)	TRANSFER DESTINATION	CODE REASON	REMARKS
40600-133	DARLOW, John	DANBURY	305	L-98
28947-117	BAYLOR, Gordon	DANBURY	305	A-99
05249-158	BLUE, Lemmie	DANBURY	305	M-78
28045-145	BYASIN Earl W.	DANBURY	305	B-97
36212-133	CARRON, Ernest	DANBURY	305	L-115
28111-145	CARTER, Donald E.	DANBURY	305	M-115
05149-158	CACHOWITZ, Samuel	DANBURY	305	D-98
07111-158	CHENTLEROV, Benjamin	DANBURY	305	J-115
04291-158	GARCIA, Manuel	DANBURY	305	L-115
05149-158	CACHOWITZ, Samuel	DANBURY	305	05149-158
05045-158	HARRIS, Arthur G.	DANBURY	305	L-115
25711-145	JOHNSON, Robert F.	DANBURY	305	E-95
01044-158	JONES, Edward	DANBURY	305	D-98
05206-158	MARINO, Salvatore	DANBURY	305	D-98
04009-158	ORTIZ, Dennis	DANBURY	305	E-95
05044-158	PARSONS, Floyd	DANBURY	305	D-11
24104-145	PAWNE, Earl	DANBURY	305	B-97
32009-158	PEREZ, Carlos	DANBURY	305	A-70
05255-158	ROBERTSON, Michael	DANBURY	305	A-70
05277-158	ROSA-SANTANA, Juan	DANBURY	305	11-11
40601-133	ROY, Albert	DANBURY	305	C-95
27149-117	SCOTT, Thomas	DANBURY	305	H-115
00350-132	SHELBY, Joseph	DANBURY	305	H-95
26334-145	SMITH, Donald	DANBURY	305	G-1
83505-158	STEVENSON, Paul R.	DANBURY	305	
*04930-158	THOMAS, Robert	DANBURY	305	
05133-158	VALENTIN, Jesus	DANBURY	305	A-95
33937-158	STYLES, Sherr	DANBURY	305	C-71
36564-133	CHAIENS, Paul	DANBURY	305	

Larry F. Taylor - Warden

(WARDEN) (DIRECTOR) (SUPERVISOR)

By Helise Harrington - C

P-102

A 2957

UNITED STATES GOVERNMENT

Memorandum

MCC-NY, NY
150 Park Row 10007

TO : Michael Gardner
Reg. No. 26035-158

FROM : Larry F. Taylor
Warden *Larry F. Taylor*

SUBJECT: Letter Dated February 8, 1977

DATE: 2/15/77

I have received your February 8th note concerning your designation to Danbury.

I'm fully aware of the correspondence exchanged between Mr. Carlson and Congressman Koch. I'm also familiar with your separation problems.

As I've previously indicated, the change in your designation comes from our Central Office. They have been advised of your concerns but thus far, we have had no changes on your destination. As of this time, we plan to move you to Danbury once your involvement in pending litigation is terminated.

LFT:sae



Feb. 19, 1977

Mr. Michael Young;
(Federal Public Defender)

On or about January 27, 1977 I was involved in a fight with inmate John Parker # 00685-158. As a result of this fight we were both "dead-locked" in our respective rooms pending review and a decision by the "Inmate Adjustment Committee".

As a result of this Committee's findings I was released from "dead-lock" status and restored all privileges enjoyed by the other inmates on Unit B3.

Unfortunately Mr. Parker remains in "dead-lock" status, restricting him from enjoying the privileges of others and restricting him to one (1) hour of recreation a day in which; he must complete his exercise, shower, telephone calls, etc. in this allotted time period.

As I understand it, Mr. Parker

A 2959

remains in this predicament because Institutional Officials say there have been threats on his life voiced by other inmates on Unit 3.

I am on amiable terms with all the other inmates on Unit 3 and have asked them their opinion of Mr. Barker as a fellow inmate. There were no feelings of animosity expressed and if at worst, only indifference.

I hope this letter may alleviate some if not all of Mr. Barker's distress and suffering.

Sincerely,
Brian A. Tott
(03921-158)

Braunig Ex 15 forward
2/1/77 BB

AFFIDAVIT

A 2960

SUSAN BRAUNIG GARDNER, also known as SUSAN BRAUNIG, being duly sworn deposes and says:

1. Until five days ago I was an inmate at the federal reformatory for women located at Alderson, West Virginia.
2. Without warning I was removed from Alderson by United States marshalls. These marshalls refused to tell me where they were taking me or why I was being removed from the facility to which I had been designated. *and without "proper paperwork" to quote the marshalls. SGP*
3. An incredible journey then ensued. The distance from Alderson to New York is approximately 500 miles. Nevertheless this journey took 14 days. Each night I was lodged in unbelievable filth in county jails.
4. Several times I came close to being sexually assaulted by inmates of the county jails.
5. Each day I was shackled hand and ~~feet~~ *WAIST SGP* and the journey resumed.
6. I cannot conceive of why I was transported under these conditions.
7. My co-defendant is an inmate of the New York M.C.C. by the name of MICHAEL GARDNER.
8. As co-defendants we have been corresponding regularly between the New York M.C.C. and Alderson with the full knowledge and consent of the authorities and officials of both institutions.
9. Our correspondence pertains to legal matters. I do not have an attorney of record regarding a number of post-conviction applications which I wish to make and I have asked and designated MICHAEL GARDNER to act as my attorney in these matters.
10. I have informed the officials at Alderson that Mr. GARDNER is my attorney.
11. I understand that Mr. GARDNER has notified the officials of the M.C.C. that he is my attorney.
12. Mr. Gardner and I are both witnesses in the matter of Wolfish v. U.S. now pending before Judge Frankel in the United States District Court for the Southern District of New York.
13. Since my arrival at the M.C.C. yesterday, both Mr. Gardner and myself have made

A 2961

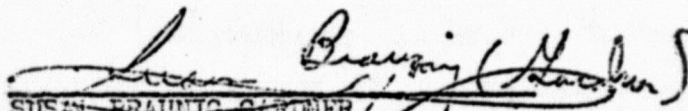
mutual legal matters.

Since we are both temporarily lodged in the same facility it seems unreasonable that I cannot meet with my chosen attorney, Mr. Gardner.

On a former occasion when Mr. Gardner and I were both at the M.C.C. we were permitted to visit by Warden Taylor.

I cannot understand why I am being denied access to my attorney; why the institution has made this denial in such an arbitrary manner and why I have been severely harassed: viz.: my terrible trip to New York and the denial of visitation rights with my attorney.

If the institution persists in its refusal for me to visit with my chosen attorney I believe that I will suffer irreparable loss and damage as a result of not being able to pursue extremely important litigation.


SUSAN BRAUTIG GARDNER
150 Park Row

born to before me

F.B.
on the 26th day of January, 1977

W. J. A. 47
17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 2962

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al.,

Petitioners

- against -

EDWARD LEVI, et al.,

Respondents

AFFIDAVIT

75 Civ.6000 (MEF)

State of New York)
County of New York : s.s.:
Southern District of New York)

SUSAN BRAUNIG (GARDNER) , being duly sworn, deposes and says:

1) I am currently being confined in the Metropolitan Correctional Center, 150 Park Row, New York, New York 10007.

2) The Case Manager on Unit V, Edward Swanson, acting in concert with Associate Warden J.R. Johnson and others is busily engaging in a course of conduct which is discriminating against me as an individual and obviously is designed to harass me and threaten me relative to my forthcoming testimony in the Wolfish suit.

A) My custody has been changed from Minimum (at Alderson, due to be Community Custody on February 13, 1977) to Close Custody. This is against the ALD Policy Statement re custody and the Bureau of Prisons Policy Statement on which it is based, which states in effect: That in transfer from one Federal institution to another, the custody status may NOT be raised unless that transfer is a disciplinary transfer and only after a hearing before the I.D.C. (Institution Disciplinary Committee which is not my case. The custody status may be lessened, but not made heavier. This was done so as to deny me privileges and rights normally accorded me at Alderson, and was done, in effect, to punish me for being willing to testify in the Wolfish suit.

B) At Alderson I am a typist-clerk for the Warden, and I am the Librarian and Law Librarian. At the M.C.C. before I was sentenced, I even did secretarial work for the Unit Manager on Unit V; the M.C.C. is in need of good typists and office workers, yet - I am assigned to Unit Sanitation. Again, in punishment for being willing to testify against the M.C.C. in the Wolfish suit.

1) I am currently assigned to both the Unit Kitchen and to Unit Sanitation. Upon information and belief based upon my own observations and numerous discussions with others, I am the only inmate with such a double assignment in the institution now or at any other time.

2) On Tuesday, February 1st, 1977, I was brought down to Mrs. Porter's office on the third floor. She attempted to issue me a work tag designating me to Unit Sanitation, Close Custody. This is completely unique. Unit personnel are never required to leave the Unit area and are therefore never given work tags. I would be the first person assigned the Unit Kitchen or Unit Sanitation who would have such a tag. The only possible reason would be to take me out of the Unit whenever a dirty, kitchen-type job came up and to further harass me. The only possible reason for giving me a tag is to enable the M.C.C. personnel to take me off the floor whenever a dirty job comes up.

3) This institution's decision to reclassify me from Minimum to Close Custody is without justification or reason. It was done without an appropriate review of my file or the hearing which is normally required. The effect will be to deter my furlough and half-way house eligibility. This is being done to threaten me and harass me. My behavior, offense severity, institutional record, ect. would all speak against this change of custody.

4) I have refused to accept the tag marked Close Custody. I was informed by Mr. Swanson on February 2, 1977, that I would not be receiving either "good" days or "meritorious" pay or any form of compensation for this forced work.

C) My legal visiting privileges and in reality, Constitutional Rights, are being interfered with in the following manner:

1) Upon information and belief, it has come to my attention that Mr. Swanson has been holding, destroying, possibly tampering with and denying me my incoming legal mail.

2) My Co-Defendant, Michael Gardner (with whom I have lived and worked for well over 4 years, and who is mentioned in my pre-sentence report), and I are being completely denied legal visits, communication by telephone (unless monitored and/or supervised - clearly an infringement on our Constitutional Rights), and even by mail. Mr. Gardner is also acting as my Pro Se attorney for post conviction relief as Judge Pierce has denied the funds to pay our court-appointed attorneys for post conviction relief such as Rule 35, 2255, 2241, and is also helping me appeal my parole commisocon decision and several civil suits in addition to those above mentioned. This, after using the proper administrative relief and getting an affirmative answer from Warden Taylor granting the legal visits. Mr. Swanson informed me that this decision was arrived at in contact with Associate Warden Johnson, who has decided to ignore the Warden's decision. Until we became involved in this class action suit, the legal visits were not being completely denied to us. After we became involved, they were totally, unilaterally, stopped.

3) Even joint attorney visits are now being denied. One recent incident was in violation of a direct Court Oder from Judge Pierce. Acting under the instruction and venom of Associate Warden Johnson, Associate Warden Butler denied joint attorney visits with Howard Jacobs, Esq. and other attorneys.

4) I cannot seem to get a document either notarized or photocopied. Mr. Swanson is conveniently not available to me.

5) Any mention of grievances is being treated as "making trouble", any mention of the law is treated with a sneer.

E) I have been subtly threatened with retaliation in the following manners:

1) In an incident that occurred in October, 1976, in which I was a bystander, but was brought before Staff in a hearing supposedly investigating the incident the morning after it happened, the following occurred. The quotations are to the best of my recollection and were written down by me the day after the incident occurred:

"I was in my room reading and writing a letter as a matter of fact - when I heard the screaming and yelling and I came out to see what was going on. As I came up the tier steps, I saw 5 officers on the G-tier one of whom was bleeding profusely from his face and neck. It was very messy. They took the officer downstairs and said they would return. Then (one of two girls involved) started to take off all her clothes and stood stark naked on the G-tier near the table. I had seen enough and I went into the T.V. room which was completely deserted and proceeded to watch a Presley movie and to wait for Madame Curie, with Greer Garson and Walter Pigeon, a good old mushy movie.

About 1 1/2 hours later, as I was watching Madame Curie, the riot squad came into the T.V. room (I was the only one there, everyone else was in the multipurpose area) and they were wearing helmets and carrying clubs which they banged on the floor, walls and steps. I was taken completely by surprise when one of them grabbed me by the arm and threw me out the door of the T.V. room. I asked, 'why are you behaving like this. What is this all about?' He then said, 'Get to your room' and banged his club on the floor.

I went quietly to my room, but for one instant my dignity screamed at me at being pushed around like that and I had the most overwhelming urge to sit down on the floor cross-legged and make them carry me or club me over the head. I was deeply angry at being herded like cattle. I had done absolutely nothing to warrant their behavior. But, I did not sit down - I went straight to my room. Anyway, the whole floor was 'deadlocked' all night until noon the next day.

There was a committee, composed of Johnson, Verdeyn, Bob Harris and Steve Harrison - with Butler occasionally dropping in and out - they examined all the girls that (officer) Richardson had put on the list. Of course my name was on the list. There had been NO riot - I found

out later that Richardson had asked the girls to go to their rooms to be 'deadlocked' because of ('s) outburst and of course no one wanted to go - having had nothing to do with her behavior. However - Richardson did not come into the T.V. room to ask me, so I didn't know what was going on.

When I went before the committee, Johnson attacked me verbally for refusing to obey Richardson's orders. I explained very quietly and calmly that I had not been asked by Richardson to go to my room - that if he had politely asked me, I certainly would have gone. Johnson screamed and yelled and became sarcastic and said,

' Politely asked her, she said. Ha! Who do you think you are! You are only an inmate. No one has to be polite to you. If anyone tells you to jump, you say "how high, Sir" and "where, Sir". You do not run this place, we do !!!!!!!!!!!!!!!'

I said, 'I beg your pardon?' (meaning, I couldn't believe he was actually saying what he was saying). Johnson mimicked me and said ' you are intelligent, you are well-educated, you know what you should have done.'

I explained that I had been in the T.V. room and exactly what had happened, to my knowledge. He said, ' You have to admit here in front of everybody right now that you are wrong. That the riot squad would have been right in clubbing you over the head and dragging you into your room and locking you in.' I said, " I disagree." Then he hit the ceiling. ' I don't want to hear that. I want to hear "Right, Sir!". I didn't say anything. Then he tried to verbally bully me into saying "Right." I just couldn't make those words come out of my mouth. I couldn't say, "Right." I said to myself - I am better than this and I will not give into these stupid egos. He then said, ' This one is going to be trouble'. Then asked, 'Are you designated here?' Steve and Verdeyn chimed in that I was pre-trial, so Johnson said, "I want her written up. I want her deadlocked now in front of everybody."

So - I was taken out and 'deadlocked'. At 4:45 P.M. (It was Friday of the Veteran's Day weekend) Steve (Unit Manager) came into my room and sat down. Steve said, "This is a shot. Johnson told me to write this shot. You are charged with inciting a riot." My teeth almost fell out. Then he said, "Before you say anything, I would tell you what I told Johnson to do with this shot, but you are a lady, so I'll just show you what I think of it", and he tore it up. "

This incident just shows what Johnson's attitude is toward the inmates.

If the Unit Manager had not been a reasonable man, I would have been in a really bad situation. Inciting a riot is a serious charge and could have destroyed my institutional record. All because of Johnson's ego and lack of respect for human rights of inmates. No wonder this man blatantly disregards Civil Rights.

A 2967

2) Mr. Swanson, in interviewing me when I returned to the M.C.C.

Last week was disturbed that I have been recommended to the half-way house by Alderson. He threatened me with saying that it didn't have to be definite, that I might not be able to go to a half-way house. This, after saying that he knew I was here to testify in the Wolfish suit. He also said at that time that he and Associate Warden Johnson were denying me any kind of visiting with inmate Michael Gardner. And then he asked if I could type; after speaking with Associate Warden Johnson, he assigned me to the dirtiest job he could find, Unit Sanitation. I happen to know that the exact same jobs I held at Alderson are available here, especially since 15 of the male cadre workers are being shipped out this week. Mr. Swanson tried to goad me into losing my temper and giving him an excuse to be able to discipline me.

3) Mr. Swanson, acting in concert with Associate Warden Johnson, has been trying to pressure me through the Floor Officers into putting myself in a position where he can discipline me. He has, in petty ways too numerous to mention here, been attempting to outrage my sense of dignity, my intelligence, and my pride. The most recent example was this morning, when he tried to bully me into cleaning on my day off, and then had the floor officers harass me all day.

This man is in a position to do great damage to me as far as my permanent record in the central file. He is attempting to harass me into refusing to testify and he is, in concert with Associate Warden Johnson, interfering with my need to meet with attorneys, correspond with attorneys and communicate with attorneys.

A 2968

Is a man like this competent to do case studies on other inmates, objectively and fairly? I think not. For the sake of all concerned in this institution, he must be stopped; this attitude that inmates are less than human with no civil rights must be stopped, and all those with whom he is acting in concert in this and other similar situations must be stopped.

- 4) The most recent example of harassment has come in the following manner:

FRIDAY, February 11, 1977 - Floor Officer Wolecki (as per the Unit Manager's instructions which are, in reality, upon information and belief those of Associate Warden J.R. Johnson) attempted to coerce me into working on my day off. He refused to admit to the logic of the situation and attempted to make it seem that I was refusing to obey the instructions of an officer. He did, however, admit that he knew it was my day off. He came into my room and woke me up to say that these orders "came from upstairs". He came in a second time and told me that the Unit Manager wanted me in his office. The Unit Manager then came into my room and threatened me regarding writing an incident report if I still refused to work on my day off. He said that "You are a sentenced Federal prisoner and must work 7 days a week." He also said that I must work regardless of the fact that I am not receiving "good days" or any monetary compensation because I am a sentenced Federal prisoner.

There are two other women who worked in the kitchen that week with me; both of whom had received their two days a week off with no problem. I was simply insisting on having my two days a week off as well.

The Unit Manager came into my room a second time and wrote an incident report because I refused to work on my day off. He threatened to write one every time I refused to work. His comment was, "I'm going to leave it up to downstairs; I'm not going to handle it anymore."

At 5:45 that evening, I was taken downstairs to see the Lieutenant on duty, Lt. Brown. I said, "I'm only required to work 5 days a week like every other inmate in this institution." His comment was, "You just keep on believing that baby!" (sarcastically). His other comments were "Who assigned you a day off?" "Are the inmates running the place now?"

I am being required to work 7 days a week, be on call from 6:30 A.M. to 6:30 P.M. (even though I only work 6 of the 12 hours) without pay or days taken off my sentence. WHAT AM I SUPPOSED TO BE, SLAVE LABOR?

A 2969

SATURDAY, February 12, 1977 - Floor Officer Wolecki (As per instructions) at 9 A.M. came into my room and told me to do the following:

- A) Polish the chrome under, around and above the kitchen unit and the microwave oven.
- B) Remop the entire kitchen floor.
- C) With steel wool with my bare hands, get down on my hands and knees and scrape the wax off the walls and edges of the floor.

An inmate later told me in confidence that she heard the Unit Manager and Officer Wolecki speaking; about making me do all these things earlier in the morning, and Officer Wolecki had made some comment to the effect, "I swear to tell the truth, the whole truth, and nothing but the truth; so help me God." and then heard them laughing about it.

At 2:30 P.M. - I was again taken to the Lieutenant's office to be questioned regarding the incident report of the day before, for the second time. This time Lt. Biller was on duty. His comments were, "What is thing all about? I don't want my name on any more writs. I don't want to get involved in this. Your friend on the 11th floor has a shot for the exact same thing. What is going on?" He then tried to justify the incident report by saying that I must be a bad worker or something; that it couldn't have been written simply because I took my scheduled day off. But then he also said, "If I tell you to do something, you have to do it. If I tell you to work, you have to work."

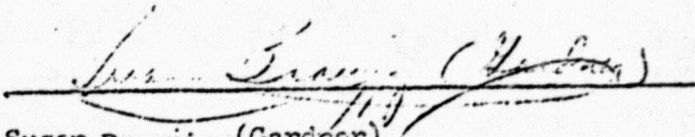
SUNDAY, February 13, 1977 - Floor Officer Zanders came up to me as I was going into Services and said, "Unit Manager just told me to keep you busy 8 hours a day. What is going on here? I don't understand all this..."

TUESDAY, February 15, 1977 - The Unit Disciplinary Committee met with me at 7:15 P.M. regarding the incident report that had been written. Counselor Grevious suggested that the decision as to whether I must work 7 days a week must be "left up to Judge Frankel", but in the meantime I had to do as ordered by them. The standing comment is, "You are a sentenced Federal prisoner and must work as long as we say you must work."

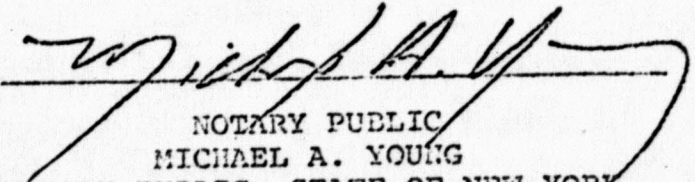
A 2970

FRIDAY, February 18, 1977 - Floor Officer Zanders came up to me nicely this morning and said, "The Man told me to work you 8 hours a day with no lunch hour and no breaks - Do you know that?"

Your Honor, it is my belief that this institution is attempting to destroy my excellent work record from Alderson, West Virginia in an attempt to keep me from going to the half-way house, work release program in July; in retaliation for my willingness to testify regarding this class action suit currently before Your Honor. I respectfully request that Your Honor order that the institution not take any more of the above mentioned actions against me or against any other members of the class; in an attempt to keep us from testifying.


Susan Brauning (Gardner)

Sworn before me this 18 day of February,
1977


NOTARY PUBLIC
MICHAEL A. YOUNG
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31-4366280
Qualified in New York County
Commission Expires March 30, 1977

AFFIDAVIT

MICHAEL GARDNER, being duly sworn, deposes and says:

1. I am currently confined at the Metropolitan Correctional Center, City and County of New York.
2. On or about July 15, 1976 I was also confined to the M.C.C. pursuant to a judgment of conviction relative to 76 Cr 21 as well as other cases.
3. On or about July 15, 1976 Ms. Susan Braunig Gardner, my co-defendant on 76 Cr 21 was also incarcerated at the New York M.C.C.
4. At that time Ms. Braunig and myself were housed on different floors of the M.C.C.
5. Upon application to our respective case managers Ms. Braunig and I were permitted to correspond with each other pursuant to Federal Bureau of Prisons policy regarding co-defendants.
6. Correspondence was effectuated by our placing letters to each other in a mail box maintained by the warden of the institution for the purposes of effectuating delivery mail.
7. On information and belief this is the same system used for legal mail throughout the federal prison system.
8. At least as to the New York M.C.C. incoming legal mail is given by the institutional mail room supervisor to the case manager of the addressee. The case manager, in turn, delivers such legal mail to the addressee unopened. At the time of delivery such mail is then opened by the case manager in the presence of the addressee to inspect for contraband only. To my knowledge no mail thus delivered is read or inspected as to its contents.
9. On information and belief this is the same system used throughout the Bureau of Prisons.
10. By utilizing this system Ms. Braunig and I were able to maintain communications regarding the appellate process of 76 Cr 21.
11. As to this appeal, I am now petitioning the United States Supreme Court for certiorari and Ms. Braunig's appeal has not yet been decided by the United

P. 11

States Court of Appeals for the 2nd Circuit.

12. Subsequent to July 15, 1976 Ms. Braunig was transferred to the Women's Reformatory located in Alderson, West Virginia.

13. I was transferred to the F.C.I. located in Sandstone, Minnesota.

14. Ms. Braunig and I continued to correspond as co-defendants subsequent to our respective transfers.

15. On or about November 30, 1976 I was transferred back to the New York M.C.C. I continued to correspond with Ms. Braunig who was still at Alderson.

16. Subsequent to November 30, 1976 both Ms. Braunig and myself both became witnesses in the matter of U.S. ex rel. Wolfish v. U.S.A., a civil action now pending before

Judge Frankel in the United States District Court for the Southern District of New York relating to intolerable and unconstitutional conditions at the New York M.C.C.

17. On information and belief the warden and various officials, including, but not limited to Edward Swanson, an institutional case manager, were apprised that Ms.

Braunig and myself were both to be witnesses in the trial of the Wolfish matter.

18. On December 26, 1976 Ms. Braunig was returned to the New York M.C.C. from Alderson. I do not know by what legal process this transfer was effectuated.

19. I was unaware that Ms. Braunig was to be transferred from Alderson on that date and consequently I had mailed to her a number of letters addressed to her at Alderson, all of which were clearly labeled "co-defendant".

20. Upon Ms. Braunig's arrival at the M.C.C. I commenced addressing mail to her through the legal mail box, clearly indicating her housing unit.

21. To date I have mailed approximately 20 letters to Ms. Braunig in this manner.

22. In January 28, 1977 and again on February 1, 1977 I met with Ms. Braunig in the company of Michael Young, Esq., the attorney who is representing us in the Wolfish case. On both of these occasions Ms. Braunig informed me in the presence of Mr. Young that she had received no mail from me.

23. On the evening of February 1, 1977 two letters were returned to me by the evening floor officer in housing unit 118. I am attaching copies of the two envelopes

A 2973

24. in question.

25. As can easily be seen by reference to these envelopes the letters in question were sent by me to Ms. Braunig at Alderson, clearly labeled co-defendant and they were stamped "returned to sender".

26. I am unable to comprehend why these letters were ~~wxx~~ returned to me instead of being transmitted by the M.C.C. mail room supervisor to Ms. Braunig when Ms. Braunig was present in the institution.

27. On the morning of February 2, 1977 I sought an interview with my institutional case worker, Ms. Karen Amy, regarding the failure of the institution to deliver these letters to Ms. Braunig and I also inquired why Ms. Braunig had received none of the letters that I had sent to her since December 26.

28. In my presence Ms. Amy telephoned the institutional mail room supervisor. Ms. Amy related to me the substance of the conversation: that the supervisor placed, as a matter of routine, incoming legal mail for M.C.C. inmates in boxes marked with the name of each housing unit supervisor. Thus, my letters to Ms. Braunig would be placed in the mail box of Mr. Edward Swanson, Ms. Braunig's case manager, for delivery to Ms. Braunig, and similarly, Ms. Braunig's letters to me would be placed in the mail box of Mr. A. Rivera, my institutional case manager. The mail room supervisor further informed Ms. Amy that he had placed a number of letters sent by me to Ms. Braunig since December 26, in Mr. Swanson's mail box for delivery to Ms. Braunig.

29. Ms. Amy continued to relay to me the substance of her telephone conversation. She stated that the mail room supervisor informed her that Mr. Swanson had served verbal notice on the mail room that he, personally, without any further authorization, was taking it upon himself to refuse to deliver my correspondence to Ms. Braunig. He gave no reason for this ex parte decision.

30. I believe that I have a constitutional right and a statutory right to correspond freely with Ms. Braunig as my co-defendant.

31. I believe that the United States Bureau of Prisons de facto recognized this

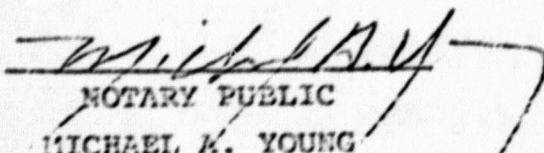
A 2974

right by its actions regarding correspondence between Ms. Braunig and myself between July 15 and December 26, 1976.

32. I believe that Mr. Swanson's ex parte action in refusing to deliver legal correspondence between co-defendants is unjustifiable, unlawful, unconstitutional, and constitutes harassment and interference with Ms. Braunig's and my right to perfect our appeal and constitutes an infringement of constitutional dimensions.
33. I fully believe Ms. Amy's account of her conversation with the mail room supervisor. She expressed shock and dismay at Mr. Swanson's actions and verbally attempted to disassociate herself from these actions.


MICHAEL GARDNER
150 Park Row
New York, N.Y. 10007

Sworn to before me this
2nd day of February, 1977


NOTARY PUBLIC
MICHAEL A. YOUNG
ARY PUBLIC, State of New York
NO. 31-4366280
ualified in New York County
ission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
LOUIS WALFISH, et al.,

Petitioners

- against -

EDWARD LEVI, et al.,

Respondents

EXHIBIT

75 CIV. 6000 (VZF)

State of New York)
County of New York : s.s.;
Southern District of New York)

MICHAEL S. GARDNER, being duly sworn, deposes and says:

The following are illustrations of a continuous pattern of harassment I am suffering at the Metropolitan Correctional Center as a result of my participation in this litigation as a witness, as of this date.

- 1) My designation has been changed from Alameda to Danbury. Regardless of direction from the Bureau of Prisons designating me to Alameda which is, obviously by normal criteria, the place where I should be sent.
- 2) My visiting privileges with inmate Susan Browning Gardner have been terminated. I am also routinely denied mail and phone privileges with Ms. Browning.
- 3) I have been reclassified close custody without regard to the appropriate custody statements.

A 2976

- 4) My visitors are searched more extensively and kept waiting longer than people visiting other inmates.
- 5) I have been refused a transfer to a private room in favor of people here on similar status and who have been here a lesser period of time.
- 6) My legal mail pertaining to this suit has been delayed for periods of up to one month.
- 7) My legal mail to Susan Braunig Gardner and hers to me simply disappears.
- 8) I am denied joint legal visits (Ms. Braunig and I) with joint counsel, except in the case of Mr. Young.
- 9) I am denied all opportunity to leave the unit, except to see Mr. Young.
- 10) I have been given an incident report for refusing to acknowledge my close custody work assignment.
- 11) The administration continues to pursue a course of action designed to create problems for witnesses in this action. That is to blame every negative occurrence on the class action. For example; recent interchange with Unit Manager Rivera,

" Can I do my time at this institution?"

Answer: " No. We're under a court order to reduce the population."

A 2977

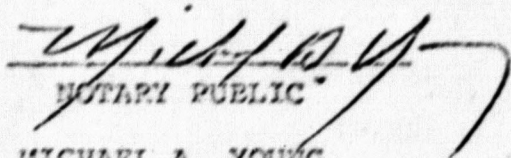
When any member of the administration is asked why visiting hours are so limited, the stock answer is,

"We're limited by the class action."



Michael S. Gardner

Sworn to before me this 18 day of
February, 1977.


NOTARY PUBLIC

MICHAEL A. YOUNG

NOTARY PUBLIC, State of New York

NO. 31-4366280

Qualified in New York County

Commission Expires March 30, 1977

AFFIDAVIT

A 2978

Albert Victory
150 Park Row
N.Y., N.Y.

Honorable Marvin E. Frankel, U.S.D.J.
Southern District of New York
United States Court House, Foley Square
New York, N.Y. 10007

State of New York :
City of New York : SS
County of Manhattan :

Albert Victory, being duly sworn, deposes and says:

That on the 3rd day of February, 1977, I was denied a visit from Ms. Susan Black, legal assistant to Daniel Meyers (Esq.) 380 Madison Ave. New York, N.Y. 10007. Ms. Black also works in the office of N.Y. State Senator Robert Garcia, as associate director of the Long Termers Legislative Task Force, 170 East 116th Street, New York, N.Y. 10024. In that capacity, Ms. Black presently is working with myself and Peter Gass (Esq.) 99 Park Ave., New York, N.Y. 10016 on redrafting the Federal, Parole Commission and Re-organization Act (1976), into a Bill for the New York State Legislature to consider as an alternative to our present parole laws, and as a sane alternative to some presently pending Bills.

Ms. Black is helping me personally in my efforts to re-investigate both witnesses and juror's involved in my state conviction for murder. Ms. Black is a very dear friend.

It is my belief that Ms. Black is being kept from visiting me because on October 15, 1976, she filed a formal complaint against a senior correction officer, Brown, for being rude, abusive and for exceeding his authority.

Prior to Ms. Black filing the complaint, Mr. Brown constantly refused to allow Ms. Black to visit with me, even after permission had been granted by A.A.C. Batchelder and by the Warden of the Metropolitan Correctional Center.

A 2979

After having been instructed by Mr. Butler, Assistant Warden at the M.C.C., that Ms. Black was approved to have legal visits with me, Mr. Brown still refused to allow her to visit me and on the 12th day of October, 1976, required Ms. Black to leave the visiting room and get new authorization to visit me.

This may sound a bit confusing, but it boils down to the fact (provable at a hearing) that Ms. Black was being played with, and being run around in a "Catch 22" fashion. Anyway, Ms. Black filed the complaint with Mr. Butler, Deputy Warden of the Metropolitan Correctional Center and all our problems began. The same day, after filing the complaint, she was barred from seeing me and asked to leave the visiting room for having kissed me on the forehead.

After that, the harassment became incredible. Ms. Black and myself were preparing for the conspiracy trial that was held before Your Honor, so we were very careful not to allow any of our actions to be in violation of any of the M.C.C. Rules of Regulations, Known and Unknown, during this period.

While Ms. Black and I were having a visit together, a correction officer, (a friend of correction officer Brown's) came into the visiting room that we (Ms. Black and myself) were having our visit. The correction officer stated that he smelled something strange outsideⁱⁿ the lobby. I told the officer to look in the ashtray on our table because some papers and trash had just been smoldering in it. The correction officer accepted my explanation and left. After some (5) or (10) minutes had past, the correction officer returned with a lieutenant named, Miller.

The lieutenant stated something to the effect, that the correction officer had said that he had smelled what he believed to be marijuana. After some discussion on the matter, Ms. Black's visit was terminated. Again she was told that she would have to get a special re-newed permission to visit with me. Following this treatment, Ms. Black again filed a complaint (the next day) and she was permitted to visit with me.

On Thanksgiving Day, November 27, 1976, Ms. Black allegedly wished to bring me a pair of "bedroom slippers" that are not considered contraband here at the M.C.C. (I presently have the slippers legally in my possession after having brought them from Green Haven Correctional Facility)

A 2980

Anyway, Ms. Black, believing that the M.C.C. officials would not allow her to give me the slippers, put the slippers under her coat in an effort to make my Thanksgiving Day more cheerful, with a gift (the slippers) from her. The slippers were noticed on her person, in the lobby of the M.C.C. and she was not allowed to visit with me.

The following day, Mr. Daniel Meyers, Esq. spoke with Warden Larry Taylor and I was told that Ms. Black would not be allowed to visit me.

Since the conspiracy trial was about to begin, and since, at best it was a nuisance issue, and a little embarrassing, we decided not to bring it to Your Honor's attention. However, now I find myself back at the M.C.C. as a Plaintiff and witness in the Wolfish v. Levi case now pending before Your Honor, and once again, Ms. Black is being denied permission to visit me.

I understand that Ms. Black's alleged conduct with the slippers may be embarrassing, but no matter what can be said of Ms. Black's conduct, it certainly cannot be claimed that she intended to bring contraband into the M.C.C. since even the respondents cannot claim that "slippers" are contraband. In fact, and I know this is argumentary! Ms. Black's actions might be called at worst, an attempt to circumvent another "Catch 22" Mystical Rule. (Please remember, I am allowed to have the slippers, I'm only not allowed to get the slippers.) In either case Your Honor, it should be noted that at no time was I or Ms. Black charged officially with any violation of a rule or regulation of the Metropolitan Correctional Center. Therefore this Affidavit is an effort to argue against non-existent charges, but a very real punishment.

Furthermore, since my arrival at the M.C.C., on February 1, 1977, all of my visitors have been held up and made to wait up to 40 minutes before being permitted to visit me. My sister, Roxana Guarriello and a friend, Rolando Terrelli, both said to me, without my having asked, that people arriving after them were immediately sent up to visit, but that they were told to just sit and wait. Both of them felt that the delay was deliberate and that the officers were sarcastic. When my sister visited me on February 14, 1977, she was told by the officers in the lobby that she should tell me that the "Officers in the lobby were looking out for my welfare, so they were personally going to call the officers on the 11th floor, (where I am housed) and see to it that I am not permitted to bring any change

(Nickels and Dimes) into the unit from the visiting room.

Newly arrived prisoners are occasionally permitted to bring some change in from the visiting room, otherwise they would not be able to use the phones for periods of weeks at a time until the prisoner is permitted to go to the commissary. Anyway, the guard that said the above statement to my sister, did call the guards on the 11th floor. One of the guards said to me that he received a call that I be especially watched since I would be trying "to get some change". Sir, I appologize for these petty and really stupid complaints, but this is the story and I was asked to include it in the Affidavit. Anyway, there I was, being watched, specially by all these guards in order to make sure that I did not sneak in a dime for the phone. (After all I might have even called Ms. Black). I object to being singled out from the outset of this lawsuit, for special treatment by the M.C.C. staff, and I object to my family and friends having to submit to unfair and sarcastic treatment. And I also object to "Catch 22", Unknown Rules and Systems that are entirely unfair.

Your Honor, in truth, Ms. Black is my extension to what prisoners call "the world". She and I, besides our personal relationship, have a very real and important professional relationship that effects the lives of thousands of men and women thruout New York State. In fact, Ms. Black is presently setting up a meeting at Green Haven Correctional Facility between members of the New York State Legislature and a small group of prisoners that I work with at Green Haven.

Respectfully Hoping That
Yours Truly,

Albert Victory
Albert Victory
150 Park Row,
N.Y., N.Y. 10007

Sworn to before me,

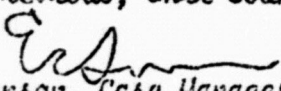
This 17 Day of February, 1977

Richard A. J.
NOTARY PUBLIC

A 2982

Mr. Charles Grevious, Unit Counselor

10 September 76


Edward C. Swanson, Case Manager

Green, Deborah #00131-183
Browning, Susan #00241-183

Charlie:

The above referred inmates have requested special visits on Sunday,
September 12, 1976 at your convenience.

Deborah Green with James Green 9th Floor South

Susan Browning with Michael Gordon 11th Floor North

Your assistance and attention to their requests is appreciated.

*And Saturday,
September 11th*

ECS/pam

*Browning Ex 1
for id 2/1/77/307*

A 2983

*Susan
Browning*

All Concerned

October 1, 1976

Steve Harrison, Unit Partner
Unit 21, 1111 1/2

Local 1111

Permission has been granted for inmates Michael Gardner (#26031-241) and Jason Manning (#26031-241) to visit on Saturday October 2, 1976 and Sunday October 3, 1976 in the visiting room on the fifth floor during regular visiting hours.

Inmates will be permitted to bring loyal papers and pens into the visiting room.

1/1/76

cc: 10th office
11th office
12th office
13th office
14th office
15th office
16th office
17th office
18th office
19th office
20th office

*Browning E. J.
for id
2h/7700*

49
FPS:slc
75-3937
2-1664

A 2984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ex rel. LOUIS WOLFISH,
et al.,

Petitioners,

-v-

EDWARD LEVI, et al.,

Respondents.



: AFFIDAVIT

: 75 Civ. 6000 (MEF)

----- X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

EDWARD C. SWANSON, being duly sworn, deposes
and says:

1. I am a Case Manager at the MCC currently assigned to Unit 5, and as such I am familiar with the matters set forth herein.
2. I submit this affidavit in opposition to the petitioner's motion for a protective order and other relief.

ALLEGED HARRASSMENT OF GARDNER

3. I was transferred as case manager from the 11th floor to my present position in early August, 1976. Since then, the only occasions on which I returned to the 11th floor were on December 28, 1976 when I relieved the regular floor officer at about 3:00 P.M. for approximately one hour, and on February 22, 1977 when I served as visiting room officer from approximately 3:00 P.M. to 3:45 P.M.

4. Neither on December 23, 1976, nor at any other time, did there occur an incident, as alleged by Michael Gardner and Louis Marcus, on which I refused to secure medical attention for Mr. Marcus or made threatening

A 2985

statements to Mr. Gardner or anyone else relating to their involvement in this action.

ALLEGED HARRASSMENT OF BRAUNIG

5. I did not tell Ms. Braunig, as alleged in paragraph 2(B)(4) of her affidavit dated February 18, 1977 that she would not receive good time or meritorious pay for her work here. On the contrary, I advised her only that it would be in her best interest to take a job assignment here if she wished to continue to earn extra good time and possible compensation.

6. In connection with the allegation made by Ms. Braunig in paragraph 2(C)(4), I deny that I have tried to avoid her and state that I have been equally available to her as to other inmates. To my knowledge, Ms. Braunig has never made a request to me that I notarize or photocopy something for her although I generally see her several times a day.

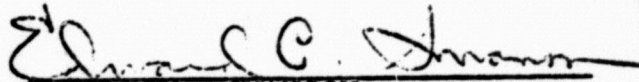
7. Likewise I deny the allegations contained in paragraphs 2(E)(2) and (3) of Ms. Braunig's affidavit that I have sought to intimidate, harras or retaliate against her in any way or for any reason. Although she has referred in passing to her going to a half-way house on several occasions, I have never commented to her about it. I was not responsible for her ^{specific (eco)} job assignment and did not recommend an assignment to Unit Sanitation. Nor have I ever tried to goad Ms. Braunig or looked for an excuse to discipline her.

8. On or about February 24, 1977 I learned from Associate Warden Johnson that there was an opening for inmate employment as a typist in the business office. That position requires a classification of medium custody

A 2986

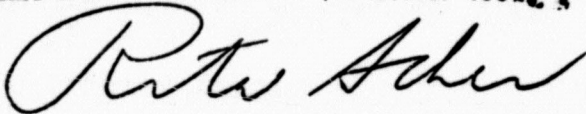
FPS:slc
7753937
2-1664

or less. As a result of previous conversations with Susan Braunig, I was aware that she claimed to be an excellent typist. I, therefore, approached her and asked her if she was interested in working as a typist in the business office. She replied that she was interested. I then pulled out a "Team Committee Action Sheet" on which I was about to recommend a reduction in Ms. Braunig's classification from close to medium custody. When she saw what I was writing, she advised me that she would not accept any job assignment where her custody would be above minimum. After I recommended that she think it over, she replied that she would like to talk it over with Charles Grevious, Correctional Counselor. She has not yet gotten back to me on this matter.


EDWARD C. SWANSON

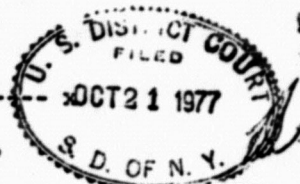
Sworn to before me this
1st day of March, 1977.

"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)",



A 2987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES ex rel. LOUIS WOLFISH,
et al.,

Petitioners,

:
AFFIDAVIT
75 Civ. 6000 (MEF)

-v-

EDWARD LEVI, et al.,

Respondents.

----- x
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

CHARLES W. GREVIOUS, being duly sworn, deposes
and says:

1. I am a Correctional Counselor at the MCC assigned to Unit 5, and as such I am familiar with the matters set forth herein.
2. I submit this affidavit in opposition to the petitioner's motion for a protective order and other relief.

ALLEGED HARRASSMENT OF BRAUNIG

3. On or about February 24, 1977, Susan Braunig asked to speak to me regarding a job assignment which Edward Swanson, Case Manager, had mentioned to her.
4. She told me that although she would like to take the job as typist in the business office, she was reluctant to accept the classification of medium custody in light of her minimum custody classification at the Federal Correctional Institution Alderson, West Virginia.
5. I explained to her that the MCC's policy was to treat all inmates here on writ as close custody inmates until we are able to determine otherwise because the central file jacket of such inmates does not come with them to the institution to which they are writted.

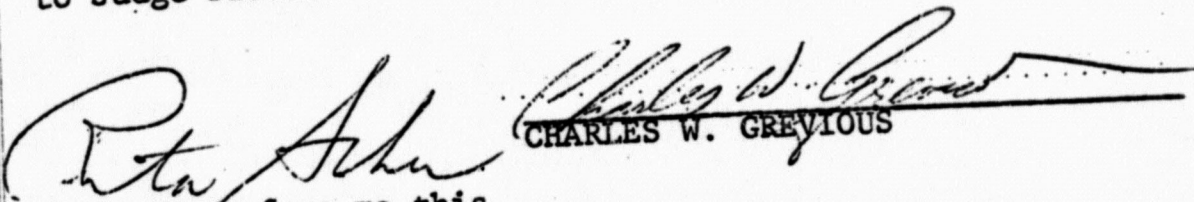
A 2988

FPS:er
75-3937
2-1664

6. Ms. Braunig questioned that policy and said she would not take the job assignment as long as she had to accept a higher classification than she had at Alderson. She further stated that she did not want to accept the medium custody classification because it would hurt the class action suit.

7. Ms. Braunig then requested permission to call Michael Gardner which I granted. She called Mr. Gardner and related the substance of our conversation. At the end of that telephone call, she repeated that she did not want the job assignment because of the medium custody classification.

8. In connection with the UDC meeting on or about February 15, 1977, I did not say, as alleged by Ms. Braunig, that the decision as to her work must be left to Judge Frankel.


Sworn to before me this
1st day of March, 1977.

"AUTHORIZED BY THE COURT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)".

51
FPS:ST
75-3937
2-1664

A 2989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

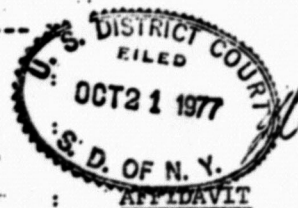
UNITED STATES ex rel. LOUIS WOLFISH,
et al.,

Petitioners,

-v-

EDWARD LEVI, et al.,

Respondents.



75 Civ. 6000 (MEF)

----- x
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

W. STEPHEN HARMISON, being duly sworn, deposes
and says:

1. I am a Unit Manager at the MCC assigned
to Unit 5, and as such I am familiar with the matters
set forth herein.

2. I submit this affidavit in opposition
to the petitioner's motion for a protective order and
for other relief.

ALLEGED HARRASSMENT OF BRAUNIG

3. Shortly after the arrival of Susan Braunig
at the MCC, on or about February 1, 1977, I was informed
that Ms. Braunig had refused to work in the MCC kitchen,
to which she had been assigned, because she objected to
her close custody classification. I therefore assigned
Ms. Braunig to the Unit kitchen and sanitation, as needed.

4. For approximately the first week of February,
1977, there were, including Ms. Braunig, three women
working in the Unit kitchen. Although prior to Ms. Braunig's
arrival the two other women had worked seven days per

A 2990

week, after her arrival, she and the other two women, began to take two days off without my knowledge. The women in the Unit kitchen work approximately three and one-half hours per day. On or about February 9¹⁰, 1977, one of the other women working in the Unit kitchen was transferred to the Federal Correctional Institution at Alderson, West Virginia; *thereafter the other women began to work seven days a week.*

5. On or about February 11, 1977, Officer Wollecki asked Ms. Braunig to do some cleaning in the kitchen inasmuch as the other woman assigned to the Unit kitchen was having a medical visit and Lt. Biller had noted that certain areas in the kitchen needed to be redone. Ms. Braunig replied that it was her day off. Mr. Wollecki then came to see me and explained the situation. I told him to go back and ask her again. She again refused. I then went to her room myself and explained that since she worked only 20-25 hours per week, she was required to work seven days if needed. I gave the option, if she wanted days off, to work in a job eight hours per day for five days per week. She stated she would have to think about it. Later that afternoon, I asked her if she was going to work that day and she replied that Michael Young had told her that she was only required to work five days per week. I then informed her that in view of her refusal to work, I would write out an incident report, which I did.

6. I have never told Ms. Braunig that she would not receive good time or pay for her work, and, in fact, she has received both.

W. Stephen Harmison
W. STEPHEN HARMISON

Sworn to before me this
1st day of March, 1977.

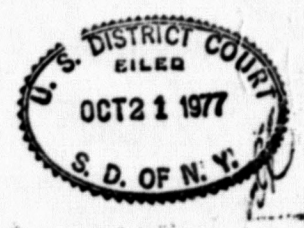
"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)".

Rita Schen

(52)

A 2991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA ex rel.
WOLFISH, et al.
:
:
Relators,
:
:
-v-
:
:
EDWARD LEVI, et al.,
:
:
Respondents.
:
:
-----X

AFFIDAVIT
75 CIV 6000 (MEF)

State of New York
County of New York
Southern District of New York

LARRY F. TAYLOR, being duly sworn, deposes and says:

1. I am the Warden at the Metropolitan Correctional Center and as such I am familiar with the matters set forth herein. I submit this affidavit in opposition to relators motion for a protective order and other relief.

TRANSFER

2. As part of our effort to achieve compliance with the Court's Order of January 19, 1977 prohibiting any double-celling at the MCC within 60 days thereof, we transferred 20 inmates (sentenced cadre) to Nassau County Jail during the period February 1-3, 1977. On February 11, 1977 we also transferred 4 inmates from the protective custody unit to the Bergen County Jail to reduce the population in that unit to 24.

3. These transfers were, in our judgement, necessary in order to ensure that we could fully comply with the Court's order of January 19, 1977 in an orderly fashion. As part of that compliance, we have been removing the bunkbeds in the affected units (Unit 3, 7North and 9North) and replacing those bunks with single beds. In order to accomplish this, the occupancy of each of the affected rooms had to be reduced, the bunkbeds disassembled and the single beds installed. In reducing the occupancy of those rooms, we needed other rooms available to which we could reassign the affected inmates. In order to reduce security risks posed by placing pre-trial inmates on the 5North work unit several rooms reassignments had to be made. Some of the sentenced inmates on 5North had skills we needed to retain and had to be moved to the Honor Unit as part of our permanent cadre. Since no other rooms were vacant and available, and we had to move pre-trial to 5North, we felt it was necessary to transfer a limited number of inmates from the MCC.

4. We selected only those inmates who were sentenced and serving short terms of incarceration. Because of the short time remaining on their sentence, we felt they would be the least affected. The anticipated expiration dates for the inmates who were transferred ranged from February 17, 1977 to April 1, 1977. As described above, on February 1-3, 1977 we made those transfers to Nassau County Jail. A local contract facility was used as opposed to the Federal Camp at Allenwood so that visiting with family could continue.

5. When those transfers were made, inmates from 7North and 9North (also some from 11South) were transferred down to 5North. To the extent that rooms became available on the Honor Unit as a result of these transfers, members of the cadre that had previously been on 5North were moved to that unit; for security reasons, we could not move inmates from 9North or 7North to the Honor Unit.

6. Because of the nature of the protective custody unit (Unit 3) we could not transfer any inmates there to other units in the institution, and in order to ensure compliance with the Court's order, we had to transfer a few inmates out of the MCC. These four inmates who were transferred went to Bergen County Jail. Unit 3 is now down to the designated total of 24 inmates. The first vacancy in the unit was thereafter used to bring back one of the men from Bergen County to the MCC. The decision on who was to be transferred was based on the degree of security they required.

7. As a result of the above measures, all bunkbeds have now been removed from the rooms on Unit 3, 7North and 9North and the MCC is in full compliance with the Court's order of January 19, 1977.

LOCK INS

8. As inmates were reassigned from 7North and 9North to 5North (as described above), I directed that 5North be locked-in on the same schedule which is followed in the other general population units of the institution except the women's unit. That decision was made for security reasons; the nature of that unit has now changed (due to the reassignments) from sentenced cadre (about whom we have a good deal of background information) to predominantly pre-trial inmates (about whom we have relatively little background information). Given that situation, I did not believe that it would be in conformity with effective and sound security, or safety procedures to leave that unit unlocked.

9. The final decision to lock individual rooms from 11:00 p.m. to 6:30 a.m. (except Friday and Saturday) in Unit 3 was reached after considering several factors occurring over a period of time.

10. Although there has been a standing order since March of 1976 to provide direct supervision 24 hours a day for Unit 3, in the past it has occasionally been necessary between the hours of 12 midnight and 6:30 a.m. to call on the unit officer to perform duties of a short duration outside the unit; under the circumstances, the unit has from time to time been left unsupervised for a short time. We recognize that this is not a desirable situation, but because of increased staffing demands related to a reduction in our work cadre and the utilization of unsentenced prisoners on work details, it may be necessary to continue this practice. Therefore, it is safer for staff and inmates and more secure to have the unit under control. The officer shortages usually only occurs during the early morning watch because it is at this time that we have the least amount of staff available.

11. In November an inmate called to my attention that other inmates in the unit were using recreation equipment and participating in activity that kept other inmates awake. As a result, some inmates were experiencing conflicts with fellow inmates. On January 27th, a fight developed between two inmates at approximately 3:00 a.m. Several other inmates were also out of their rooms during this incident. A few days prior to the fight, the associate warden had been advised by an inmate informer that another inmate was considering taking a hostage in an escape attempt.

12. Cumulatively, these incidents plus the fact that all other units are required to lock-in at the same time influenced my decision to implement the lock-in policy for Unit 3 as well. This decision, as well as the decision on the 5North lock-in, was based purely on administrative and security considerations and no way related to the pending class action or any other pending litigation.

CUSTODY CLASSIFICATION:

13. The MCC policy regarding custody classification at the time an inmate is committed to the MCC is contained in Policy Statement 7300.112 entitled, "Custody Classification." That policy statement, at paragraph 6, page 4 reads as follows:

"INITIAL CUSTODY CLASSIFICATION. All commitments, upon arrival at the New York MCC, will initially be classified as Close Custody pending immediate Unit Team Review."

(A copy of that statement is annexed hereto as Exhibit A)

4 A 2994

This is a bureau wide policy and is necessary because an inmate's file does not normally accompany the inmate on writ status and the receiving institution has very little, if any, information upon which to make a custody classification.

14. Pursuant to that policy, Susan Braunig was given the initial classification as "close custody."

15. Ms. Braunig's close custody classification while temporarily at the MCC does not affect her eligibility for parole, custody classification upon return to Alderson, her ability to earn good time or meritorious pay. Moreover, Ms. Braunig's close custody status at the MCC will have no adverse impact on her ability to have her custody ultimately reduced when she is returned to Alderson.

R. L. Schen

Sworn to this 1st day of March, 1977

"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)".

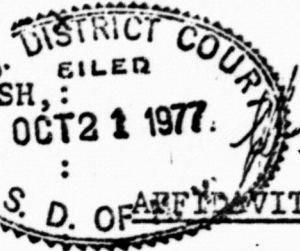
Larry E. Taylor
Larry E. Taylor
Warden, MCC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 2995

UNITED STATES ex rel. LOUIS WOLFEISH,
et al.,

Petitioners,



- v -

75 Civ. 6000 (MEF)

EDWARD LEVI, et al.,

Respondents.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ELKAN ABRAMOWITZ, being duly sworn, deposes
and says:

1. I am Chief of the Criminal Division in the
office of Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York, and as such, I
am familiar with the matters set forth herein.

2. I submit this affidavit in opposition to the
petitioners' motion for a protective order and other
relief.

REDESIGNATION OF GARDNER

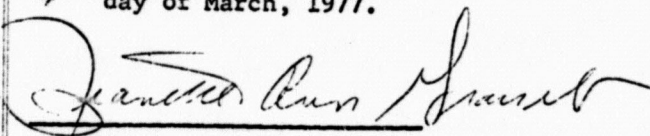
3. In late January, 1977, I was informed by
Assistant United States Attorneys Jed Rakoff and Eugene
Kaplan that they had learned that Michael Gardner had been
redesignated to go to Allenwood after Congressman Koch
had contacted the Bureau of Prisons.

4. With Messrs. Rakoff and Kaplan in my office, I then contacted Norman Carlson, Director of the Bureau of Prisons. I indicated to Mr. Carlson that although Mr. Gardner had been redesignated to Allenwood at Congressman Koch's request, it was our understanding that Mr. Gardner was not eligible for such designation; I further stated my understanding that Mr. Gardner had previously misstated Judge Pierce's sentencing recommendation. I requested that Mr. Carlson forward to me copies of the correspondence with Congressman Koch on this matter, and he responded that if there were no privacy problems he would do so. At the time of this telephone conversation, I was unaware of Mr. Gardner's involvement in this law suit.

5. By letter dated February 3, 1977, I received copies of correspondence between the Bureau of Prisons and Congressman Koch on this matter. Shortly thereafter, I was advised that Mr. Gardner had been redesignated to the FCI, Danbury, Connecticut.


ELKAN ABRAMOWITZ

Sworn to before me this
4th day of March, 1977.

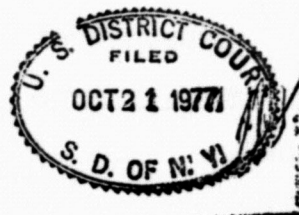


JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-154175
Qualified in Kings County
Commission Expires March 30, 1977

54

A 2997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X

UNITED STATES ex rel. LOUIS WOLFISH, :

Petitioners, : AFFIDAVIT

- against - : 75 cw. 6000 (MEF)

EDWARD LEVI, et al., :

Respondents. :
-----X

State of New York)
County of New York : ss:
Southern District of New York)

ABRAHAM RIVERA, being duly sworn, deposes and says:

1. I am the Unit Manager of the eleventh floor at the Metropolitan Correctional Center and as such I am familiar with the matters set forth herein.

2. I submit this affidavit in opposition to the petitioner's motion for a protective order and other relief.

LOCK-IN ON 11S

3. As part of my duties I am responsible for the overall supervision of the clean-up of the eleventh floor.

4. In order to improve the morning clean-up procedure in the dormitory unit (11S), in or around early January, I informed the correctional officers in that unit to lock-in the inmates to insure that beds were made and that the floors and bathrooms were properly cleaned.

5. In the course of my rounds, I observed this clean-up procedure to last approximately 30 minutes.

6. After one to two weeks, the Warden observed this procedure and recommended that the doors not be locked during the clean-up. Thereafter, I informed the correctional officers of this change. However, the policy has continued of requiring all the inmates to remain in their dormitories during the clean-up, although the doors are not locked.

7. I have observed this procedure on a number of occasions and have not observed it to interfere with the clean-up process. On the contrary, by requiring all the inmates to make their beds and do the other cleaning at the same time, the officers no longer have to chase after individuals who failed to carry out these duties. As a result, the dormitory unit is now cleaner

A 2998

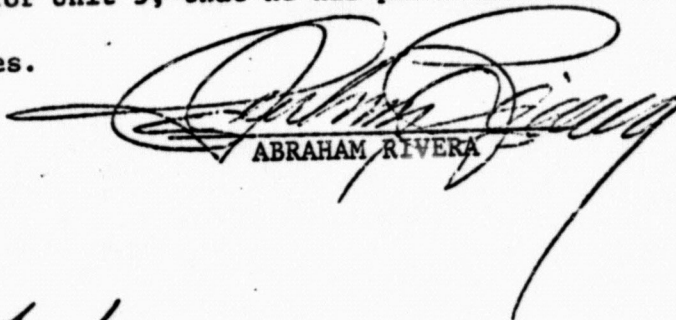
than prior to the institution of the new policy.

BRAUNIG - GARDNER VISITS

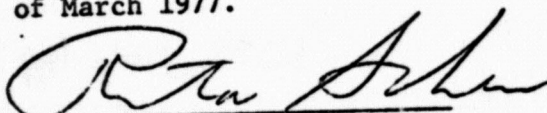
8. On or about February 2, 1977, Michael Gardner requested by written memo that I authorize a visit with Susan Braunig. At that time, I orally informed Mr. Gardner that I had no objection but that I had to check it with Associate Warden Johnson who is my immediate supervisor.

9. Upon discussing the matter with Mr. Johnson, he advised me that pursuant to his memorandum of December 3, 1975 Mr. Gardner and Ms. Braunig were not entitled to a special visit. I conveyed this information to Mr. Gardner.

10. Since that time, I have permitted Mr. Gardner to call Ms. Braunig on at least two occasions, and I have been informed by Charles Grevious, Correctional Counselor for Unit 5, that he has permitted at least one telephone call between said inmates.


ABRAHAM RIVERA

Sworn to this 1st day
of March 1977.


Notary Public

"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)".

(5)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 2999

-----X

UNITED STATES EX REL WOLFISH, et al., :

Relators, :

- v - : AFFIDAVIT

EDWARD LEVI, et al., : 75 Civ 6000 (MEF)

Respondents. :

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JED S. RAKOFF, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Southern District of New York, and, as such, am familiar with the matters set forth herein. I submit this affidavit in response to that portion of petitioner's motion for a protective order regarding Michael Gardner's designation to the FCI at Danbury, Connecticut.

BACKGROUND

2. I was the Assistant United States Attorney in charge of the case of United States v. Michael Gardner, 76 Cr. 21 (S.D.N.Y.) (LWP) in which, following a one-month trial, Michael Gardner was convicted on May 26, 1976 of 13 counts of devising and executing a series of interrelated fraudulent schemes between 1973 and 1975 in violation of 18 U.S.C. §§1341, 1342, 1343, and 2314. On July 7, 1976, Judge Pierce sentenced Gardner to 5 years (concurrent) on counts 1 through 12 and 1 year (concurrent) on count 13.* Further, because of Gardner's

*At the trial, Gardner had testified for five days. At sentencing, Judge Pierce found that Gardner's testimony had been untruthful and his memory "selective."

A 3000

allegation at sentencing that he would be in danger if he were returned to Danbury, Judge Pierce stated that he would recommend that Gardner not be sent to Danbury* (See Exhibit C to Michael Young's Affidavit dated February 23, 1977.)

3. Shortly after that sentencing I consulted with Elkan Abramowitz, Chief of the Criminal Division in this office, and stated to him that it had occurred to me that Gardner's statement to Judge Pierce concerning alleged danger to him at Danbury might be part of a newly conceived scheme by Gardner to be designated to the prison camp at Allenwood, Pennsylvania (for where, it was my understanding, he did not qualify), since, in all the numerous proceedings regarding Gardner in which I had participated following his original designation to Danbury, he had never previously challenged that designation nor mentioned any fears of physical harm there. I told Mr. Abramowitz that I was further concerned because it had already been proven in Gardner's last trial that, even though incarcerated, he was directing associates in the commission of still further crimes, and a minimum security institution would enhance his opportunities for directing further schemes. At Mr. Abramowitz's suggestion I called the Central Office of the Bureau of Prisons to find out where Gardner would be designated. At that time, I spoke with

*Gardner, a long-time active swindler well known to our Frauds Unit, had previously been convicted in this District of conspiracy to commit stock fraud and in the Northern District of Illinois of concealing and transporting a million dollars in stolen Treasury bills. He was sentenced to a year and a day on the first conviction and three years (later reduced to two) on the second conviction, but he did not begin serving these sentences until his arrest in connection with the third case in May, 1975. At that time, he was designated by the Bureau of Prisons to serve his sentence in Danbury, i.e. a medium security institution.

Michael Quinlan and advised him of the concern that I had previously expressed to Mr. Abramowitz. I informed Mr. Quinlan that Gardner had been sentenced to 5 years by Judge Pierce and had some additional time from his two prior convictions and I asked Mr. Quinlan if Gardner were eligible under Bureau of Prison guidelines for designation to Allenwood. Mr. Quinlan stated that Gardner would not be qualified for Allenwood in any event because his combined sentences had exceeded 5 years. Mr. Quinlan further advised me that Gardner would be eligible for a "Danbury type" facility, i.e., a medium security institution.

4. Thereafter, on September 17, 1976, Gardner was sentenced by Judge Ward of this Court on still a fourth conviction (United States v. Michael Gardner, 76 Cr. 277 (RJW)) in which Gardner had pled guilty to conspiracy to dealing in stolen T.V.A. bonds. Just prior to sentencing, Gardner had written to Judge Ward falsely stating that for security reasons Judge Pierce had previously recommended that he be sent to Allenwood. (A copy of that letter is annexed hereto as Exhibit A.) At the time of sentencing, I responded to that statement, noting that

"Judge Pierce made no recommendation regarding Allenwood whatsoever, nor was Allenwood ever raised at any time." (U.S. v. Gardner, 76 Cr. 277, Tr. dated September 17, 1976, p. 21 a copy of which is annexed hereto as Exhibit B.)

Judge Ward sentenced Gardner to a three year term of supervised probation to follow his remaining years of imprisonment.

5. I subsequently called the record office at MCC to find out if Gardner had left the institution, and was advised that he was about to leave and was going to Allenwood. I immediately called Mr. Quinlan about this matter, and he indicated that there must have been a mistake because it had been his understanding that Gardner was to be designated to either Danbury, or if Judge Pierce's recommendation were followed, to some equivalent institution like Sandstone or Texarkana. He said he would check into it. He called me back the same day and indicated that there had indeed been a mix-up and that Mr. Gardner had been designated to a medium security institution in the next region over, namely, Sandstone, Minnesota. I later called the record office at MCC and was told that it had already received notice from Washington that Mr. Gardner would be returning to MCC and that he would be sent to Sandstone.

6. I subsequently received a copy of a letter dated October 2, 1976 written by Gardner to Judge Pierce in which he stated

"Judge, you recommended a minimum security camp and specifically mentioned Allenwood. The sentence allows for me to go to Allenwood and there is room there. The only problem is that Mr. Rakoff has again interfered; this time not only with my being able to 'join the system' but with the recommendation of the court." (A copy of which is annexed hereto as Exhibit C.)

By letter dated October 5, 1976, Howard R. Hawkins, Judge Pierce's law clerk, responded to Gardner's letter stating that

"Contrary to your assertion, Judge Pierce made no reference to Allenwood or to any other minimum security institution in the sentencing proceeding or in the judgment of conviction." (A copy of which is annexed hereto as Exhibit D)

PRESENT DESIGNATION

7. In approximately late January, 1977, Frederick Schaffer and Louis Corsi, government counsel in this case, asked me for trial transcripts in Gardner's criminal case and other materials or information that might be useful in cross-examining Gardner. In the course of that discussion I was informed that Gardner had recently been re-designated yet again to go to Allenwood at the conclusion of this case. I expressed astonishment and, after recounting the matters set forth above, stated that I was going to call the Bureau of Prisons to inquire why Gardner had been redesignated to Allenwood. Mr. Corsi advised me not to do so because he anticipated that if Gardner's designation was again changed, the government would be charged with retaliation because of Gardner's involvement in this law suit. I responded that my intended inquiry with Mr. Quinlan had nothing to do with Gardner's involvement in this case (about which I knew then and still know now, almost nothing), and that it was because of the matters set forth above. I stated that Gardner had made a career of intimidating people with false accusations

and lies, and that, having helped to convict him for defrauding in the public, I was not about to let him get away with defrauding the Bureau of Prisons and the Courts simply out of fear of some false accusation he might make in this lawsuit.

8. A day or two later, at my request, Eugene Kaplan, another Assistant in this office, who prosecuted Susan Braunig (Gardner's mistress and confederate)* called Mr. Quinlan and was informed that Gardner had been redesignated to Allenwood at the request of Congressman Koch. Mr. Kaplan and I brought this matter to Mr. Abramowitz's attention who then called Norman Carlson, Director of the Bureau of Prisons. In a very brief conversation, Mr. Abramowitz told Mr. Carlson that we understood that, at Congressman Koch's request, Gardner had been redesignated to Allenwood, even though it had been our understanding that he did not so qualify. Mr. Abramowitz's sole request was that Mr. Carlson forward copies of the correspondence with Congressman Koch.** By letter dated February 3, 1977, Mr. Carlson forwarded the requested correspondence.

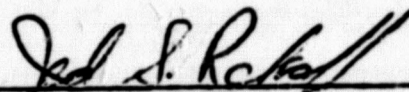
* At Gardner's sentence before Judge Pierce, the Court found that, while incarcerated, Gardner had given Susan Braunig detailed instructions on how to commit a bank fraud in Canada, which Braunig thereafter committed.

** It is my understanding that, at the time Mr. Abramowitz made this call, he had no knowledge that Gardner was a witness in this lawsuit.

A 3005

JSR:dlf

9. Shortly thereafter, without any further contact with the Bureau by me or Mr. Abramowitz (or, to my knowledge anyone else), I was advised by Mr. Abramowitz that Gardner had been redesignated by the Bureau of Prisons to the FCI at Danbury, Connecticut.

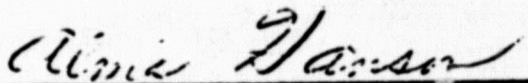


JED S. RAKOFF

Assistant United States Attorney

Sworn to before me this

2nd Day of March, 1977.



NOTARY PUBLIC

ALICE J. HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

A 3006

Michael S. Gardner
150 Park Row
New York, New York 10007

September 6, 1976

Honorable Robert Ward
United States District Judge
Southern District of New York
U.S. Courthouse
40 Foley Square
New York, New York 10007

Dear Judge Ward,

I write you with two purposes in mind. First, I would start by thanking you. My unfortunate path in recent years has lead me to many a courtroom. Forgive me if I am presumptuous but, I have gained more from my short time in your courtroom than I have from all the rest together, and then some. It was you who gave me the courage, by treating me like a man - yes, I've become accustomed to being treated like something less - to plead guilty for the first time. This was a major step forward in coming to grips with myself. It drove home a certain realization of what my situation is. Something I have not been able to face until now. It is as though I have been in a semi-conscious state, almost dazed most of the day. This is how I've gotten through these sixteen months in jail. I thank you for forcing me to wake up and face my predicament.

I thank you for giving me the "immunity" hearing and for the sincerity you showed. I know you listened with open mind to both sides of the story. When you ruled, obviously I couldn't be happy; but, neither could I be aggrieved, because you explained how you viewed the matter relative to law. What you spoke was pure and simple, it was logical beyond question. Your evaluation of Mr. Teller's credibility and the reasons you so credited him, as well as your overview of the situation, were remarkable for one day's observation.

Most of all, I appreciate the way you treated me. Being in prison has been a horrid experience. It is dehumanizing and I had almost forgotten that I was able to communicate for myself. Being in your courtroom was clearly a turning point for me in many ways.

I come now to the obvious, my second reason for writing, to request leniency. Your Honor, I have many grounds for making this request. The crime in question

September 6, 1976

page two

goes back to 1972, prior to the commencement of my co-operation. The same period of time, during which the other actions for which I have already been punished took place. I am guilty; but my part in the transaction was minimal, and I don't know how it could be said that I victimized anyone. I was just trying to help a friend who was down on his luck, and thereby to help myself.

I humbly submit that my co-operation with the Government, co-ordinated by Mr. Thaller, invoked the wrath of Mr. Edwards (this indictment was returned a mere few days prior to his leaving the office) and, in effect, was the cause of my problems in the Southern District. For the past three years, I have lived a horrid existence. My life has been under constant threat as a result of my co-operation, and at the same time, the Southern District has pursued me relentlessly. I have been investigated to a point that staggers reason.

My prison experience has been complicated by the fact that since my first day of incarceration to the day of sentencing in this case, I have had detainers lodged against me in the form of pending cases. Hence, such privileges as furloughs, normal custody evaluation, parole, etc. have never been available to me. I have not had one moment of freedom in the last sixteen months. This case is, hopefully, my last. My prison experience has been further complicated by my co-operation, as I have been moved some twenty-four times and travelled over 25,000 miles in chains, since incarcerated. I have been required to change from witness to defendant with amazing agility.

I am not in any way a part of any criminal sub-culture found in jail. As a result, jail is a very lonely experience for me. George Bernard Shaw once said, "He knows what the criminal type is - it is manufactured in prison by the penal system: If you keep one (man) in penal servitude and another in the House of Lords for ten years, the one will show the stigmata of a typical convict, and the other of the typical peer." I fear the effect of prolonged imprisonment. The myth of prison as a rehabilitative force has long been dispelled; the problem becomes to avoid the negative effects of my environment. I attempt to do this by staying as much to myself as possible. Prisons are not, however, designed to allow for this type of behavior, but are more structured for communal living. I attempt to spend my time reading and writing, but again the simple objective of self-betterment is difficult to achieve. Jail certainly seems like a counter-productive experience as, the longer I am here, the less fit I will be to reenter society.

My personal life will, no doubt, be before Your Honor in other documents. In short, I am an honor graduate of Brooklyn College, I served my country honorably as an officer in the U.S. Navy, and I feel I have many legitimate business ventures under my belt. I have been married for fifteen years, and am the father of three wonderful children. My mother, who is very dear to me, is in failing health; my father is deceased. My sleepless nights in jail are marred by thoughts, and filled with nightmares, of such things as the children

(my twins are now fourteen) leaving for college before I return home, or of my mother dying before I am released from jail.

Punishment is far from equal. Few people in jail have ties to the community such as mine. As a result, the separation from the community, coupled with the condemnation of our society, and the actual experience of confinement itself have, indeed, been a disheartening experience. What you see now is only a portion of the man that once was. What is suppressed by putting me in jail is the family ties, the community ties, all of the worthwhile aspects of my existence. What is encouraged is any criminal mentality. Indeed jail, by bringing out the worst in a man, can teach a lesson; a lesson in what one does not want to become, a lesson in anti-social behavior. I have been in jail for sixteen months and have, by now, certainly learned anything that jail can ever teach me.

I am working hard to complete drafts of two books while in jail. One is a tabloid of my personal experiences, the other is more academic in nature and is a study of economic trends in America. I hope to have them both ready for publication upon my release. I plan to attempt a new career upon release, in the area of investigative journalism.

I hope the Court will consider that further incarceration can, indeed, serve no purpose - as well as the fact that it is hardly called for, in view of the fact that this case is a 1973 fact pattern, which I told the Government about.

I beg the Court to consider some form of punishment short of prison for me, for the remainder of my term. Wouldn't society be benefited and justice be better served if I were in a half-way house or on a work release program, where my time was dedicated to community or charitable service? Wouldn't I be benefited and rehabilitated further if I were allowed to return to school or to dedicate my time to community or charitable service? In this enlightened age, before a Court such as yours where wisdom and justice prevail, isn't there an alternative to continual imprisonment which would better serve the ends of justice?

Because of security reasons, Judge Pierce recommended that I be sent to Allenwood and not returned to Danbury. My life would be in jeopardy at Danbury or Lewisberg. May I request that this Court recommend similarly that I be sent to Allenwood, or that I be kept in New York and be allowed to finish my term at a half-way house or on a work release program and utilize my time as discussed above.

Again, my thanks for your consideration and time,

Respectfully,



Michael S. Gardner

1 bsas

21

2 THE COURT: Anything further that you wish to
3 say? If so, you certainly are free to say it, but I do say
4 to you that I had received your letter. I read it carefully
5 and I read the letter from your wife. I have both of them
6 here, as a matter of fact.

7 THE DEFENDANT: If you have done that, your
8 Honor, I'm sure that suffices. Thank you.

9 THE COURT: At this point I will hear from
10 the United States Attorney, if he has any comments or
11 recommendations he wishes to make prior to sentencing.

12 MR. RAKOFF: Your Honor, I want to draw the
13 Court's attention to the only point in the voluminous papers
14 that conceivably seems to me could be of relevance this
15 morning, and that is Mr. Gardner in his personal letter
16 addressed to your Honor states that because of security
17 reasons Judge Pierce recommended that he be sent to Allenwood
18 and not returned to Danbury.

19 Your Honor, that is incorrect. Judge Pierce
20 made no recommendation regarding Allenwood whatsoever,
21 nor was Allenwood ever raised at any time.

22 Your Honor, the only inescapable facts in this
23 case are that Michael Gardner has now been convicted of
24 four -- on four different occasions of felonies ranging
25 from a period in 1970 to a period up to the time of his

A 3010

October 2, 1976

I picked this letter up from my husband and typed it so
it would be more legible.

Judith Gardner

A 3011

150 Park Row
New York, New York 10037
October 2, 1976

Honorable L. Pierce
Judge of the District Court
Southern District of New York
Federal Court House
Foley Square
New York, New York 10007

Dear Judge Pierce,

I beg for your consideration on a matter of deepest urgency to me. I have been incarcerated for seventeen months. During that time I always had a detainer lodged in the form of a pending case. As a result of this I have not been eligible for furloughs or other special programs. After six cases, which constituted six months of actual trial time, after being moved on over 20 occasions, after seventeen horrid months, I finally have no further cases, no pending matters; all that remains, assuming the conviction is affirmed, is to serve the sentence you imposed. Indeed, it is time for me to start re-establishing the worthwhile ties I had in the community, and to start making plans for the future.

On Thursday, October 31 I was to be sent to Allenwood Prison Farm. After being at the M.C.C. for over eight consecutive months, and a total of eleven of the last thirteen months, I was delighted at the prospect. The very idea of being outdoors and breathing fresh air (something I haven't done for over eight months) excited me. Furthermore, Allenwood has a large Jewish contingency and I would be able to pray with them on Yom Kippur. I was finally going someplace to do my time, to be just another inmate. This was of course what you in your wisdom had recommended in the sentencing order. It was not to be. Word was received over the radio minutes before we arrived at Allenwood that I was to be brought back to the M.C.C. I spent the night in segregation at Lewisberg and was brought back to New York on the same bus the next day.

When I arrived at the M.C.C. I was told that word had "come down" not to send me to any prison camp, and that I was to be returned to Danbury. I spoke up about my problem at Danbury, a problem which has been confirmed by the officials at Danbury, and I am now scheduled for the F.C.I. at Sandstone, Minn. The Sandstone facility is a medium security institution about fifteen hundred miles from New York. It provides no programs or educational opportunities for me. More important I could never afford to have my family visit and even if I eventually got a furlough I couldn't afford to come home. May I remind Your Honor briefly that I have a mother who is a cancer victim and three children, twins 14 and a boy 11, who all visit me regularly and are at an age when they badly need a father.

A 3012

When I got back to New York on Friday I called home and my eleven year old son answered. When I told him where I was he tearfully told me that mommy and him were coming to visit me in Pennsylvania on Sunday and Monday because mommy had checked and we could all go to temple together. It would have meant so much to us all to be able to pray together. Again we were denied the right to plan two days ahead.

Judge, you recommended a minimum security camp and specifically mentioned Allenwood. The sentence allows for me to go to Allenwood and there is room there. The only problem is that Mr. Rakoff has again interfered; this time not only with my being able to "join the system" but with the recommendation of the court. There is no reason other than Mr. Rakoff's feelings for me not going to Allenwood. I am not violent, I am not an escape risk, I am not involved in drugs or a drug user, I am certainly not organized crime. On the other hand, there is every reason to send me to Allenwood - it is close enough for my family to visit, pleasant enough for the children to come and close enough for me to be able to keep track of my mother's condition and be at hand if and when an emergency occurs. It provides the best possible opportunity for rehabilitation of family ties. From Allenwood I can arrange plans for my future, I can also take courses toward an advanced degree at nearby Bucknell University. My poor wife has been tried and tested mercilessly by me and by the system and you at the time of sentencing stated that I have brought great pain to my family. Now must the system add to that pain? Realize that I could not even call from Sandstone as my wife is self-supporting and I certainly do not want to add to the burden by making expensive collect calls.

The bus trip to Sandstone with all the hold-overs takes approximately six weeks each way. I am appalled at the fact that a phone call from an assistant U.S. Attorney carries more weight than a judge's recommendation which coupled with the facts of the case makes so much more sense than the suggestion of the U.S. Attorney. Yet this institution seems to feel differently.

Judge Pierce, I beg you to call this institution to see if this matter can be straightened out. In the alternative I request that you issue an order which states that I should serve my sentence in Allenwood. I have seen judges order work-release, week-ends, and various sentences here at the M.C.C. We even have one man serving a year and a day from Monday to Friday.

I know it is within the power of the court to somehow stop this travesty. Neither my family nor I feel capable of withstanding the kind of separation that would be created by my being sent to Sandstone. It would be inhumane, counterproductive, and counterrehabilitative. I beg for your help. I apologize for the appearance of this letter but all of my belongings are being held by the institution as I am in a hold-over status.

Thank you in advance for your help.

Respectfully,

A 3013

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE LAWRENCE W. PIERCE
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

October 5, 1976

Mr. Michael Gardner
c/o Federal Correctional Institution
Sandstone, Minnesota 55072

Dear Mr. Gardner:

Judge Pierce has received your letter dated October 2, 1976 and has asked me to respond to it.

Contrary to your assertion, Judge Pierce made no reference to Allenwood or to any other minimum security institution in the sentencing proceeding or in the judgment of conviction. A review of the transcript reveals only the following statement:

"[THE COURT:] Further, the Court will make a recommendation on Form AO235 that attention be given to defendant's safety in that regard that he not be sent to Danbury" (United States v. Michael Gardner, 76 Cr. 21 (S.D.N.Y. July 7, 1976), Tr. at 32.)

Judge Pierce did in fact recommend that you not be sent to Danbury, as the attached photocopy of the judgment reveals. It is Judge Pierce's practice not to recommend that defendants be sent to particular institutions upon sentence. However, where safety is a factor, as you stated it was in your case, the Judge often recommends that the defendants not be sent to a particular institution.

You may wish to communicate with the Director of the U.S. Bureau of Prisons concerning your situation.

Very truly yours,

HOWARD R. HANNINS, JR.
Law Clerk to Judge Pierce

HRH:aa

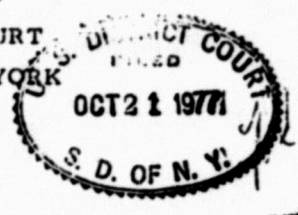
Encl. cc: AUSA Jed Rakoff and Stanley H. Fischer, Esq.

Exhibit D

56

A 3014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA ex rel.)
LOUIS R. WOLFISH, et al.,)
Relators,)
UNITED STATES OF AMERICA)
et al.,)
Respondents)

AFFIDAVIT

CIVIL ACTION NO. 75 Civ. 6000

DISTRICT OF COLUMBIA) SS:

I, Norman A. Carlson, being duly sworn, do hereby state as
Director of the Federal Bureau of Prisons I am ultimately responsible for the
assignment of federal offenders to appropriate correctional institutions for service
of sentences.

The institutional assignment of Michael S. Gardner was brought to my
attention by Congressman Edward Koch of New York in a letter dated December 28,
1976. Congressman Koch had been asked to determine whether Mr. Gardner could
be moved closer to New York City from the Federal Correctional Institution at
Sandstone, Minnesota. My staff determined that transfer to the Federal Prison Camp
at Allenwood would be appropriate, and we so informed Congressman Koch on
January 13, 1977. Shortly thereafter, I received a call from Elkan Abromowitz,
Chief, Criminal Division, in the U. S. Attorney's Office, Southern District of New York.
Mr. Abromowitz questioned the assignment of Mr. Gardner to Allenwood because of
his record as a major fence of stolen securities and pointed out efforts by Mr. Gardner
to misrepresent Judge Pierce's recommendation at sentencing as to his institutional
designation.

Based on this information and after consultation with my staff con-
cerning Mr. Gardner's assignment, it was agreed that the factors communicated to
us by Mr. Abromowitz together with Mr. Gardner's status as a repeat offender, made
his designation to Allenwood inappropriate. I changed Mr. Gardner's assignment
to the Federal Correctional Institution, Danbury, Connecticut, without conferring

///

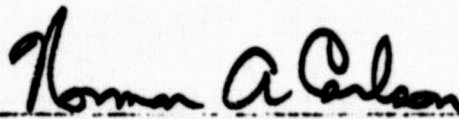
A 3015

FILED 217 MAR 22 DISTRICT COURT

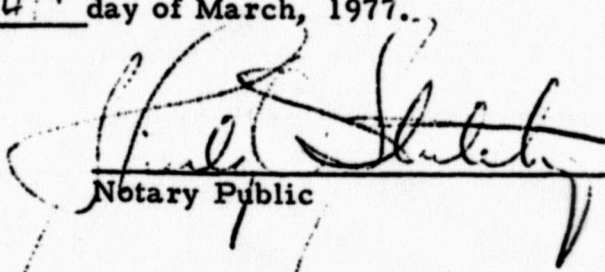
- 2 -

or without my staff conferring with Warden Taylor or with any member of the Metropolitan Correctional Center staff in New York City. At the time of this change, I did not know that Mr. Gardner was actively involved as a witness or otherwise involved in the class action suit currently before the U. S. District Court for the Southern District of New York.

Prior to changing Mr. Gardner's assignment to the Federal Correctional Institution, Danbury, Connecticut, it was necessary to arrange the transfer from Danbury of an offender, Seymour Pollack, who Mr. Gardner has testified against. Mr. Pollack was in need of medical treatment and was reassigned to the Federal Correctional Institution at Lexington, Kentucky. With Mr. Pollack's transfer from Danbury, there was, to our knowledge, no inmate at Danbury who needed to be separated from Mr. Gardner. In our opinion, the assignment of Mr. Gardner to Danbury presents no danger to him.


NORMAN A. CARLSON, Director
Federal Bureau of Prisons

Subscribed and sworn before me this 4th day of March, 1977.


Notary Public

My Commission Expires August 14, 1977

(57)

A 3016

WGB:lm

September 9, 1976

BY HAND

Hon. Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, N.Y.

Re: United States ex rel Wolfish v. Levi
75 Civ. 6000 (MEF)

Dear Judge Frankel:

We wish to inform the Court and, by copy of this letter, counsel for the Relators that the New York Telephone Company has informed Warden Taylor that because of the number of fraudulent long-distance telephone calls originating from the pay phones at the MCC (in the amount of approximately \$100,000 in the past six months) it plans within the very near future on converting those phones to "restricted dialing" which would permit phone calls only to telephones within area codes 212, 914, 516 and 201.

The Government is presently discussing with representatives of New York Telephone Company possible alternatives and the time schedule for this proposed conversion. We can not presently anticipate the outcome of these discussions, but will keep the Court and counsel informed.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney

By:

LOUIS G. CORSI
Assistant United States Attorney
Tel.: (212) 791-1966

A 3017

LGB:

**Hon. Marvin E. Frankel
United States District Judge**

-2-

September 9, 1976

**cc: Legal Aid Society
Criminal Appeals Bureau
U.S. Courthouse
Foley Square
New York, N.Y.**

Att: Michael Young, Esq.

58
A 3018

LGC:isk

75-3973

BY HAND

January 31, 1977

Michael Young, Esq.
Legal Aid Society
Room 509
United States Courthouse
Foley Square
New York, New York 10007

Re: United States ex rel Wolfish
v. Levi, 75 Civ. 6000 (MEF)

Dear Mr. Young:

As we first advised you during the Court's tour of the MCC on December 22, 1976, plans were being developed for separate facilities on the Third Floor of the MCC for attorney visits. These plans have now been approved, as described below, and work is scheduled to begin within two to four weeks and to be completed within two weeks thereafter.

The Warden has advised us that the lobby area adjacent to the elevators on the Third Floor will be enclosed, providing approximately 850 square feet of space and will be used for attorney visiting. This enclosure will be of masonry block (approximately three feet high from the floor) and glass from the block to the ceiling. Tables and chairs will be installed in this area for the attorney visits; in addition, one bathroom and drinking fountain will be located in this area and available for inmate and attorney use. This attorney conference room will be monitored via T.V.

A 3019

LGC:isk
75-3973

Michael Young, Esq.
Legal Aid Society

-2-

January 31, 1977

camera.

Five of the present six offices on the west wall of the lobby area will open into this enclosed area (approximately 400 square feet). The doors for four of these offices will be removed to permit visual observation of each of these areas; use of these rooms will be on a first come, first serve basis. The door on the fifth office will remain locked and that room will be reserved for special situations, e.g., when an attorney must use recording equipment, for depositions, etc.

In addition, security devices are being installed on the north stairwell on the First through the Third Floors (within the secure perimeter of the institution). These devices will allow exit and entrance only onto the First and Third Floors and are being installed to permit opening that stairwell so that attorneys, after being checked through the visitors' desk and passing into the secure area of the MCC, can go unescorted (through this stairwell) to the visiting area on the Third Floor. Likewise, at the conclusion of their visits, attorneys will be able to return to the First Floor via this route.

The planned hours of operation for this room are 8:00 A.M. through 7:30 P.M., seven days per week. For conferences at times other than during these hours, special requests will be required. Although advance notice will not be required during these hours, it will be advisable for attorneys to provide the MCC with some advance notice so as to minimize waiting time for the attorneys while the inmate is being brought to the Third Floor area.

In addition to the above, we wish to advise you of some other planned changes. Plans have now been approved and work is scheduled to begin within two weeks, to construct a glass partition in the main lobby of MCC. This glass partition will be placed across the lobby just behind the receptionist-switchboard operator's desk. After visiting forms have been filled out and submitted to a lobby officer and the information on the form has been verified by the visiting officer (at the visitors' desk), the visitor will be permitted to pass through the partition for a security check and transportation via the elevators to the appropriate

A 3020

LGC:isk
75-3973

Michael Young, Esq.
Legal Aid Society

-3-

January 31, 1977

visiting room. The Warden has advised us that this partition and procedure is necessary in order to properly separate those visitors who have been checked and are ready to proceed to the visiting rooms from those individuals who have not yet been through the procedure. It also permits better control of individuals exiting through the visitor elevators or through the main door from the secure perimeter of the institution.

In conjunction with this alteration, an additional visitor processing line is being installed. The Warden is hopeful that this additional check-through line will speed-up the process for both family-friends and attorney visitors.

Within the next thirty days, it is also planned to construct a sally-port at the elevators in the basement by the kitchen. The Warden advises us that this is being undertaken to strengthen security in the kitchen-warehouse areas.

Lastly, as the Warden advised the Court and counsel during the tour on December 22, 1976, plans for some type of industry for the MCC were being developed. Those plans have now been approved, permitting the installation of a brush and broom manufacturing industry on the Seventh and Ninth Floors of the MCC. It is anticipated that approximately thirty individuals could be employed in this operation. This will entail some renovation work in part of the classroom areas on these two floors, and as those plans are finalized we will further advise you.

In connection with the above changes on attorney visiting and the industries, we would like to discuss with you the possibility of settling the portions of the lawsuit dealing with these issues. Please advise us of a time which is convenient for you. Of course, if you need further information on any of these matters, please let us know.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By:

LOUIS G. CORSI
Assistant United States Attorney
Telephone: 791-1967

LGC:isk
75-3973

A 3021

Michael Young, Esq.
Legal Aid Society

-4-

January 31, 1977

cc: Honorable Marvin E. Frankel
United States District Judge
United States Courthouse
Southern District of New York
Room 2002
Foley Square
New York, New York 10007

A 3022

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

To Taylor
1/12/77

CHAMBERS OF
JUDGE MARVIN E. FRANKEL

January 12, 1977

Hon. Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Attn: Louis Corsi, Esq.
F. P. Schaffer, Esq.

Re: U.S. ex rel. Wolfish, et al., 75 Civ. 6000

Dear Mr. Fiske:

Enclosed is a copy of a letter received today,
together with a copy of my reply, respectively from and
to Mr. John Cordero, now incarcerated in the Metropolitan
Correctional Center.

I think these letters are self-explanatory.

Very truly yours,

Marvin E. Frankel
Marvin E. Frankel

cc: Mr. John Cordero

1/11/77

HONORABLE SIR,

I AM WRITING TO YOU BECAUSE OF A PROBLEM THAT HAS RISEN HERE AT THE FEDERAL M.C.C., IN THE SPECIAL PROTECTIVE UNIT FOR WITNESSES (UNIT 3)

SIR, BECAUSE OF THE ONE MAN TO EACH ROOM RULING, THERE IS WORD GOING AROUND THAT SOME OF US WILL BE TRANSFERRED TO THE NASSAU COUNTY JAIL BECAUSE OF THE OVERCROWDEDNESS HERE.

SIR, THAT INSTITUTION DOES NOT HAVE A SPECIAL UNIT OR AREA FOR PROTECTING WITNESSES. WITNESSES ARE PLACED IN THE GENERAL POPULATION AT THE MERCY OF THE OTHER INMATES.

IN MY SITUATION IN PARTICULAR I WOULD BE IN GREAT DANGER IN THAT INSTITUTION BECAUSE NOT ONLY HAVE I TESTIFIED FOR THE FEDERAL GOVERNMENT, BUT I HAVE ALSO TESTIFIED FOR THE NASSAU COUNTY AUTHORITIES AGAINST MEMBERS OF ORGANIZED CRIME. ALSO, MY PICTURE HAS APPEARED TWICE IN THE LONG ISLAND NEWSPAPER, NEWSDAY BECAUSE OF MY

TESTIMONY.

ALSO, I AM VERY WELL KNOWN IN THAT COUNTY AND COULD POSSIBLY BE KILLED IN THAT INSTITUTION.

I WOULD ALSO LIKE TO POINT OUT THAT HERE AT M.C.C. WE ARE PROVIDED WITH FREE UNLIMITED POSTAGE AND DAILY USE OF THE TELEPHONE, ALONG WITH OTHER PRIVILEGES. AT THE NASSAU FACILITY A FEDERAL WITNESS MUST PAY FOR HIS STAMPS, ENVELOPES AND WRITING PAPER AND HE IS ONLY PERMITTED ONE SIX MINUTE PHONE CALL PER WEEK. ALSO, HERE WE HAVE CONTACT VISITS WITH OUR FAMILIES, WHERE WE CAN SIT AND HOLD OUR WIVES AND CHILDREN. AT NASSAU THIS IS NOT PERMITTED.

I WOULD LIKE TO CLOSE BY REEMPHASIZING THE MOST IMPORTANT PROBLEM AT NASSAU, THE LACK OF SECURITY FOR WITNESSES, WHICH IS THE MOST SERIOUS.

I'M HOPING YOU LOOK INTO THIS MATTER.

Respectfully,

John Cordero

JOHN CORDERO

UNIT 3 - 04240-158

A 3025
UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

January 12, 1977

CHAMBERS OF
JUDGE MARVIN E. FRANKEL

Mr. John Cordero
Metropolitan Correctional Center
150 Park Row
New York N.Y. 10007

Dear Mr. Cordero:

This is in response to your letter of
yesterday.

I am not directly in charge of problems like
the one you report. You will understand that the role
of judges in relation to prisons is very limited. My
hope is that the problem of your safety, as well as the
other concerns you report, will be suitably and res-
ponsibly handled by the prison authorities who are in
charge. I see no other action I can take at this
time except to pass on your problem and my reaction
by sending a copy of your letter and this response to
the United States Attorney, which I am doing.

Very truly yours,

Marvin E. Frankel

cc: Hon. Robert B. Fiske, Jr.

Attn: Louis Corsi, Esq.
F.P. Schaffer, Esq.

FPS:cr

June 30, 1977

75-3973

06-3014
BY HAND

Honorable Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: United States ex rel (Wolfish v. Levi
75 Civ. 6000 (MEF)

Dear Judge Frankel:

We had hoped that our post-trial memorandum of law would be our last submission with respect to the issues tried to the Court in the above-captioned case. However, several aspects of petitioners' reply memo require a brief response:

1. Timing - Petitioners' reply memo was served on us 11 days after we served the final installment of our post-trial memo. Petitioners' counsel informed us the day before we received it that the Court had granted a four-day extension of time for petitioners to file their reply memo. We had never been notified of the request for that extension. Such discourtesy has been typical of the actions of petitioners' counsel in this case. In light of their vehement and unreasonable objection to our request for an extension of time to file our post-trial memo, we find their failure even to give us notice of their request highly objectionable.

2. Social Visiting - In a footnote on pp.11-A and 11-B of their reply memo, petitioners refer to a draft policy statement on visiting which we had recently shown to petitioners' counsel and to discussions between them and us concerning that policy statement. We find such reference to material outside the record to be improper. Even more disturbing, however, are petitioners' distortions as to the contents of the policy statement and of our conversations regarding it. Petitioners' counsel advised us of their concern that the policy statement represented a restriction

of the length of each visit to one hour regardless of whether or not there was ample room to accommodate a longer visit and a reversal of the MCC's practice of not counting an inmate's children (under 16) toward the three-person limit per visit. We replied that no such changes were intended, but that because of their concern, we would consider redrafting the relevant language to make it clearer that visits would be limited to one hour only when there were other visitors waiting to use the visiting room and that the three-person limit excluded an inmate's children under 16. Such a revision of the policy statement has now been done. In view of this and of the fact that the scheduled visiting hours are substantially expanded by that policy statement, petitioners' claim that its implementation would result in an shortening of visiting hours is totally untrue.

3. Dormitory Conditions On p. 15 of their reply memo, petitioners assert that each inmate in the 11 South Unit has only 43 square feet of "living space." That statement is patently false. As we demonstrated at p.81 of our post-trial memo, each inmate in the dormitory unit has 43.25 square feet of sleeping space; the total living space per inmate is 68.61 square feet. Since all of the standards and holdings regarding dormitory conditions are based on sleeping space plus common space, the use of the figure for total living space is entirely appropriate.

4. Medical Care - Petitioners insist that the report of the medical panel is evidence in this case. They ignore the fact that although the report was available on March 10, 1977 (Tr. 963), it was never offered or received in evidence during petitioners' case. Moreover, when at the close of the trial they belatedly stated their assumption that it was in evidence, we objected and the Court sustained that objection, ruling that if the parties could not settle the medical issues, a further hearing would be held at which time petitioners could call members of the panel and witnesses (Tr. 3037). That ruling is clearly correct, since the panel's report is inadmissible hearsay. Neither the Court's order providing for the appointment of the medical panel and the preparation and distribution of its report, nor the respondents' reservation of their right to present their own expert testimony justified petitioners' assumption that the report would be received in evidence. The fact remains that it never was and could not have been so received. Respondents' did not move to dismiss the medical issues at the close of petitioners' case for the obvious reason that at that time it was the understanding of the parties and the Court that the trial of those issues would await efforts

to resolve them by mutual agreement. We have now drafted a letter to petitioners' counsel setting forth respondents' proposal for settling the medical issues which will be sent as soon as our clients have approved it.

5. Telephones - On pp.21-22 of their reply memo, petitioners charge us with dishonesty in misrepresenting their objection to a sign-up list for collect long-distance calls. Petitioners' concede, as they must, that the preliminary injunction, ¶C(2), specifically provides for a sign-up list for all long-distance calls. However, petitioners contend that by requiring inmates to sign up in advance, the MCC is violating ¶B(2) of the preliminary injunction. This contention is sheer nonsense. In the first place, the procedures from which collect calls are excluded by the terms of ¶B(2) relate to advance authorization for commissary charges; they have nothing whatsoever to do with the sign-up list. Moreover, there is no basis for petitioners' attempt to distinguish between the use of a sign-up list *per se* (which they concede is valid) and the requirements that inmates sign up in advance (which they contend violates the preliminary injunction order). Obviously, the existence of a sign-up list creates an incentive for inmates to place their name on it early in the day. Furthermore, to ensure that the sign-up list is respected, a copy of the sign-up list is taken to the long-distance operator. However, if not all of the time slots are filled in before the commencement of long-distance telephone service, inmates may continue to sign up thereafter and additional copies of the sign-up list are delivered periodically to the operator. See MCC Policy Statement 7300.79 (Oct. 12, 1976). Furthermore, there is no evidence that inmates who fail to sign up for a collect call are refused permission to place it at times when no reservation has been made on the sign-up list. Thus, while signing up in advance is clearly the best way for inmates to make sure that they will be able to make a collect long-distance call, they are not required to do so except for the purpose of reserving a time slot. That policy conforms with the provision of the preliminary injunction authorizing the use of a sign-up list.

6. Sanitation - There is absolutely no support for petitioners' statement at p.30 of their reply memo that respondents concede the accuracy of petitioners' claims as to unsanitary conditions. On the contrary, as we demonstrated at pp.222-28 of our post-trial memo, there is little evidence of any pattern of neglect in this area and certainly none

FBI:GL
75-3973
06-3014

Honorable Marvin E. Frankel

-4-

June 30, 1977

to support the contention that the conditions at the MCC are unconstitutional.

7. Legal Mail - Despite the clear terms of the Court's order on the summary judgment motions as to the definition of legal mail, petitioners' counsel now states that the Court indicated that that issue had been left open for further litigation. We have no recollection of such a statement by the Court, and point out that the Court's order specifically dismissed so much of the amended petition which sought to include mail other than from attorney's and the courts in the requirement that such mail be opened only in the presence of the inmates.

8. Employment - Petitioners now urge on pp.33-34 of their reply memo, that they are entitled to the Federal minimum wage for their work under the Fair Labor Standards Act. The short answer to that contention is that as prisoners in the custody of the Attorney General, they are simply not "federal employees" within the meaning of the Act. See Worsley v. Lash, 421 F. Supp. 556 (N.D. Ind. 1976).

9. Staff Assignment - Petitioners rely on the recent decision in Portis v. Ward, 77 Civ. 1560 (S.D. N.Y., June 22, 1977), in urging that female officers should not be assigned to male unit and male officers should not be assigned to female units. However, in that case the Court found a pattern of abuse and invasion of privacy that simply has not been demonstrated here. Furthermore, in view of the fact that there is only one female unit at the MCC (and only one female's institution in the Federal system), the assignment policy advocated by petitioners would severely curtail the job opportunities open to female correctional officers and might very well violate Title VII of the Civil Rights Act of 1964.

10. Confiscation of Property - Petitioners argue at p.41 of their reply memo that hearings are required even when the property seized belongs to the MCC in order to determine that that is in fact the case. That argument fails to recognize the reality of the situation faced by respondents. For example, quite often there is a shortage of dishes or utensils because inmates have been improperly retaining them in their rooms. The staff of the MCC must then go around "seizing" plates, knives, forks, etc. so that the next meal can be served. It is absurd to suggest that such "confiscation" of property requires a hearing.

Moreover, even in those cases where inmates have some property interest in the items seized, petitioners do not explain why the use of the administrative grievance procedure fails to provide inmates with sufficient due process to protect them against the confiscation of property which is not contraband. In Cruz v. Ward, Docket No. 77-7043, Slip op. at 4403-06 (2d Cir. June 23, 1977), the Court held that due process does not require inmates to be given a hearing before being transferred from a psychiatric facility to a prison. The basis for that decision was that risk of an erroneous decision was slight and the probable value of additional safeguards small compared to the government interest involved and the administrative burden of requiring such hearings. The same reasoning applies to the imposition of further procedural safeguards in connection with the seizure of contraband.

11. Notice of Transfers - The Second Circuit in Cruz v. Ward, supra, Slip op. at 4407, also rejected the contention that inmates should be given notice of their impending transfer. Its reasoning is equally applicable to that issue in this case:

We also have trouble with the district court's requirement that in every case the inmate be given notice of his impending transfer. A possible problem with advance notice is that an inmate who knows he is about to be returned to prison may, in the words of defendant Sweeny, "go back to his ward and blow his stack and get everybody else upset." Whether such notice would substantially enhance the decision-making process or ease the trauma of adjustment for the transferred inmate is a matter of conjecture. Clearly, however, the pros and cons of notice policy are a subject that is better left to the judgment of the doctors at the hospital.

12. Legal Standards - Finally, we wish to call to the Court's attention the Supreme Court's recent decision in Jones v. North Carolina Prisoners' Labor Union, Inc., 45 U.S.L.W. 4820 (June 23, 1977). In Jones the Court upheld prison regulations which banned inmate-to-inmate solicitation to join a labor union and barred union meetings and bulk mailings concerning the union from out-

June 30, 1977

side sources. The holding is clearly relevant to those issues in this case, such as grievance procedures and modular confinement, which petitioners contend involve associational rights. More importantly, however, the Court's reasoning undercuts much of petitioners' argument on other issues as well as on the legal standards to be applied.

The Court began by noting that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment." 45 U.S.L.W. at 4822. The Court went on to state that "[b]ecause the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators." *Id.* Thus, in evaluating the security concerns of the prison administrators, the Court held as follows:

In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order." *Id.* at 944-945. Rather "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Pell v. Procunier, 417 U.S., at 827. The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.

Id. Indeed, the Court specifically rejected the argument that the lack of evidence of union disruption demonstrated the unreasonableness of the prison administrators' position, noting that "[t]his historical finding, however, does not state that appellants' fears

Honorable Marvin E. Frankel -7-

June 30, 1977

as to future disruptions are groundless...." Id. at n.5. The Court therefore concluded, in deferring to the determination of the prisons officials that a prisoners' labor union would be detrimental to order and security in the prisons, that "[i]t is enough to say that they have not been conclusively shown to be wrong in this view." Id. at 4823-24.

We respectfully submit that similar deference should be given to the reasonable concerns with the security and proper administration of the MCC which underlie respondents' policies challenged herein.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney

By:

FREDERICK P. SCHAFFER
Assistant United States Attorney
Telephone: (212) 791-1923

cc: The Legal Aid Society
Federal Defender Unit
509 United States Courthouse
Foley Square
New York, New York 10007



A 3033
THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Federal Defender Services Unit
United States Court House
Foley Square — Room 509
New York, N. Y. 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER, Attorney-in-Charge

December 29, 1976

The Honorable Marvin E. Frankel
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York, 10007

Re: Wolfish v. Levi, 75 Civ. 6000

Your Honor:

In response to respondents' submission today of the affidavit of Walter Menninger, M.D., petitioners wish to note only that nothing in that affidavit obfuscates petitioners' clear entitlement to relief by summary judgment from double-celling at MCC. The papers previously filed in this proceeding establish that there is no genuine issue as to any material fact on this issue. Moreover, this Court itself toured the facility and observed, first-hand, the overcrowding, deprivation of privacy, and other adverse effects which result from double-celling. As noted in petitioners' summary judgment papers, medical experts, correctional experts, the courts, the architect of MCC and even the Federal Bureau of Prisons itself have uniformly condemned double-celling, particularly where, as here, that double-celling takes place in rooms which respondents concede were originally designed and designated to house only one person. In the face of this overwhelming uniformity of opinion, the mere fact that a single doctor, whose vitae indicates that his only significant experience with prison conditions was as an employee of the Federal Bureau of Prisons, now comes forward to assert that double-celling is acceptable in one of that Bureau's facilities, should not be seen to require denial of the relief to which petitioners are clearly entitled. If such were the case, then summary judgment on any issue would be impossible, since the respondents in any action will always be able to find at least one person to disagree with the prevailing opinion on any issue. Wherefore, it is respectfully requested that the Court grant petitioners' motion for summary judgment on this issue.

Respectfully submitted,

Michael Young
Counsel for Petitioners

MR. ZUPA
75-3973

HAROLD H. HEALY, JR.

Chairman of the Board
ROBERT B. MCKAY

President

DEC 30 AM 11:23

ARCHIBALD R. MURRAY
S. D. N. Y. Executive Director
& Attorney-in-Chief

WILLIAM E. HELLERSTEIN

Attorney-in-Charge
Criminal Appeals Bureau



A 3034
THE LEGAL AID SOCIETY

75-3973

HAROLD H. HEALY, JR.

Chairman of the Board

Criminal Appeals Bureau

ATTORNEY

ROBERT B. MCKAY

President

Federal Defender Services Unit

United States Court House

Foley Square — Room 5097

New York, N. Y. 10007

(212) 732-2971

JAN -3 PM 5:03

S. D. N. Y.

ARCHIBALD R. MURRAY

Executive Director
& Attorney-in-Chief

PHYLIS SKLOOT BAMBERGER, Attorney-in-Charge

WILLIAM E. HELLERSTEIN

Attorney-in-Charge
Criminal Appeals Bureau

December 30, 1976

The Honorable Marvin E. Frankel
United States District Judge
United States District Court
for the Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: WOLFISH v. LEVI, 75 CIV. 6000 MEF

Your Honor:

I am writing this letter to supplement our response of yesterday to the respondents' submission of an affidavit from William Menninger, M.D. In our response, we called the Court's attention to the uniformity of opinion among medical experts, correctional experts, the courts, the architect of MCC and even the Federal Bureau of Prisons in condemnation of double-celling. In light of Dr. William Menninger's alleged expertise on the psychiatric effects of prison conditions, we wish specifically to direct the Court's attention to the testimony of psychiatric experts who have condemned double-celling.

In Valvano v. McGrath, 70 C. 1390 (E.D.N.Y. Opinion of 7/31/73), Judge Judd expressly relied on the testimony of Augustus F. Kinzel, M.D., a psychiatrist of established reputation, in holding double-celling unconstitutional. Although declining to accept Dr. Kinzel's theory of "buffer zones" (a distinguishable area around an individual which, when trespassed upon by another without consent, induces tension and aggression), Judge Judd did credit and rely upon Dr. Kinzel's extensive testimony as to the adverse psychological effects of double-celling. Specifically, in his testimony in that case on January 23, 1974, Dr. Kinzel referred to the "frequent humiliation of being locked in with another person, who you don't -- may or may not with [sic. want] to be locked in with, having to defecate and urinate in his presence..." (24; *Id.* 26). Dr. Kinzel further testified that double-celling and the over-crowding that accompanied it causes

alienation, increased suspiciousness of other people, withdrawal, and increased feelings of helplessness and despair (27). He further testified that persons who are double-celled have a "higher tendency to have actual acts of homosexuality..." and that the artificially induced enactment of these latent tendencies is usually traumatic to the individual, instilling panic and depression, and causing him to question his masculinity and "disown" himself (30). Similarly, in Rhem v. Malcolm, 70 Civ. 3962 (S.D.N.Y.), although the City voluntarily agreed to cease the practice of double celling, Dr. Carl Menninger testified that the overcrowding resulting from double-celling was one of the principal factors having "serious damaging psychological effects" on the inmates so housed (transcript of January 17, 1973 at 883-888). Finally, I am advised by Alvin Bronstein, Esq., Director of the National Prison Project of the American Civil Liberties Union Foundation, Washington, D.C., that both Dr. Carl Menninger and another psychiatrist, Dr. Ardrey, testified against the practice of double-celling in Campbell v. McGruder, Civil Action No. 1462-71 (D.D.C.). Although we are not in possession of those transcripts, we will arrange to have them forwarded here if the Court wishes to examine them.

Concerning Dr. William Menninger, upon whom the Government relies, as we noted in our letter yesterday, his only significant experience with prison conditions appears to have been as an employee of the Bureau of Prisons, in whose behalf he now speaks. We have since learned that Dr. Menninger is not only a past employee of the Bureau, but is currently a paid consultant to that organization, who has consistently testified in behalf of its policies. Thus, for example, we have been advised by Mr. Bronstein, Esq., whose project served as co-counsel for petitioners in Clonce v. Richardson, 73 CV 373-S (W.D.Mo.), that Dr. William Menninger testified in behalf of the Bureau's involuntary inmate behavior modification program in the magistrate's proceedings in that case. Although we are not in possession of the transcripts of that proceeding, we will arrange to have them forwarded here if the Court wishes to examine them.

In light of Dr. William Menninger's apparent bias, the Government's willingness to rely solely on his conclusory affidavit in support of double-celling should not prevent the Court from granting petitioners the relief to which they are so clearly entitled.

December 30, 1976

2

Wherefore, it is respectfully requested that the Court grant petitioners' motion for partial summary judgment.

Respectfully submitted,

MICHAEL A. YOUNG
Attorney for Petitioners

MAY/bb

cc: Louis G. Corsi, Esq.

A-3037



THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Federal Defender Services Unit
United States Court House
Foley Square — Room 509
New York, N. Y. 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER, Attorney-in-Charge

75-3973
HAROLD M. HEALY, JR.
U. S. ATTORNEY, Chairman of the Board
ROBERT B. MCKAY President
1977 JAN -4 AM 10:12
ARCHIBALD R. MURRAY
S. D. N. Y. Executive Director
& Attorney-in-Chief
WILLIAM E. HELLERSTEIN
Attorney-in-Charge
Criminal Appeals Bureau

January 3, 1977

The Honorable Marvin E. Frankel
United States District Judge
United States District Court
Southern District of New York
2002 United States Court House
Foley Square
New York, New York 10007

Re: WOLFISH v. LEVI, 75 Civ. 6000

Your Honor:

In response to your request for the transcripts of the proceedings in Valvano and Rhem, I am submitting herewith the following:

1. The transcripts of January 23 and 24, 1974, in Valvano, containing all of the testimony given by Dr. Kinzel in that proceeding (beginning with page 3 of the January 23 transcript; and
2. The transcript of January 17, 1973, in Rhem, containing all of the testimony of Dr. Carl Menninger in that proceeding (beginning at page 854).

Additionally, I am submitting herewith the following:

1. The transcript of November 14, 1972, in Rhem, in which Dr. Kinzel also testified as to the adverse psychological effects of double-celling; and
2. The joint appendix filed in the appeal of the Valvano case.

I am including the latter because the Valvano case was the principal proceeding in this Circuit examining the issue of double-celling. The appendix therefore contains

The purpose of the Society is to render legal aid in the City of New York to persons who are without adequate means to employ other counsel.—By-laws of The Legal Aid Society.

The Honorable Marvin E. Frankel
United States District Judge
United States District Court
Southern District of New York
2002 United States Court House
Foley Square
New York, New York 10007

Re: WOLFISH v. LEVI, 75 Civ. 6000

January 3, 1977

2

all of the testimony which both sides felt was relevant to this issue, and affords this Court the opportunity to examine the testimony of non-medical experts as to double-celling. The Court's attention is directed in particular to the testimony of Louis J. Gengler, former warden of the Federal Detention Headquarters at West Street (beginning at page 45a of Volume I of the appendix) in which he described the Metropolitan Correctional Center and the importance of the "single-cell occupancy" at that institution in enabling an inmate to "preserve some of his individualism" and enjoy certain moments of privacy (59a).

The Court's attention is also directed to the testimony of Arthur Rubin, then the warden at Queens House of Detention, in the appendix to the petitioners' brief, in which he described the adverse effects of double-celling on inmates. (Appendix, Volume I, pages 100-101, 103-104, 106-107, 109-110, 112-113, 115-116, 118-119, 121-122, 124-125, 127-128, 130-131, 133-134, 136-137, 139-140, 142-143, 145-146, 148-149, 151-152, 154-155, 157-158, 160-161, 163-164, 166-167, 169-170, 172-173, 175-176, 178-179, 181-182, 184-185, 187-188, 190-191, 193-194, 196-197, 199-200, 202-203, 205-206, 208-209, 211-212, 214-215, 217-218, 220-221, 223-224, 226-227, 229-230, 232-233, 235-236, 238-239, 241-242, 244-245, 247-248, 250-251, 253-254, 256-257, 259-260, 262-263, 265-266, 268-269, 271-272, 274-275, 277-278, 280-281, 283-284, 286-287, 289-290, 292-293, 295-296, 298-299, 301-302, 304-305, 307-308, 310-311, 313-314, 316-317, 319-320, 322-323, 325-326, 328-329, 331-332, 334-335, 337-338, 340-341, 343-344, 346-347, 349-350, 352-353, 355-356, 358-359, 361-362, 364-365, 367-368, 370-371, 373-374, 376-377, 379-380, 382-383, 385-386, 388-389, 391-392, 394-395, 397-398, 400-401, 403-404, 406-407, 409-410, 412-413, 415-416, 418-419, 421-422, 424-425, 427-428, 430-431, 433-434, 436-437, 439-440, 442-443, 445-446, 448-449, 451-452, 454-455, 457-458, 460-461, 463-464, 466-467, 469-470, 472-473, 475-476, 478-479, 481-482, 484-485, 487-488, 490-491, 493-494, 496-497, 499-500, 502-503, 505-506, 508-509, 511-512, 514-515, 517-518, 520-521, 523-524, 526-527, 529-530, 532-533, 535-536, 538-539, 541-542, 544-545, 547-548, 550-551, 553-554, 556-557, 559-560, 562-563, 565-566, 568-569, 571-572, 574-575, 577-578, 580-581, 583-584, 586-587, 589-590, 592-593, 595-596, 598-599, 601-602, 604-605, 607-608, 610-611, 613-614, 616-617, 619-620, 622-623, 625-626, 628-629, 631-632, 634-635, 637-638, 640-641, 643-644, 646-647, 649-650, 652-653, 655-656, 658-659, 661-662, 664-665, 667-668, 670-671, 673-674, 676-677, 679-680, 682-683, 685-686, 688-689, 691-692, 694-695, 697-698, 700-701, 703-704, 706-707, 709-710, 712-713, 715-716, 718-719, 721-722, 724-725, 727-728, 730-731, 733-734, 736-737, 739-740, 742-743, 745-746, 748-749, 751-752, 754-755, 757-758, 760-761, 763-764, 766-767, 769-770, 772-773, 775-776, 778-779, 781-782, 784-785, 787-788, 790-791, 793-794, 796-797, 799-800, 802-803, 805-806, 808-809, 811-812, 814-815, 817-818, 820-821, 823-824, 826-827, 829-830, 832-833, 835-836, 838-839, 841-842, 844-845, 847-848, 850-851, 853-854, 856-857, 859-860, 862-863, 865-866, 868-869, 871-872, 874-875, 877-878, 880-881, 883-884, 886-887, 889-890, 892-893, 895-896, 898-899, 901-902, 904-905, 907-908, 910-911, 913-914, 916-917, 919-920, 922-923, 925-926, 928-929, 931-932, 934-935, 937-938, 940-941, 943-944, 946-947, 949-950, 952-953, 955-956, 958-959, 961-962, 964-965, 967-968, 970-971, 973-974, 976-977, 979-980, 982-983, 985-986, 988-989, 991-992, 994-995, 997-998, 1000-1001, 1003-1004, 1006-1007, 1009-1010, 1012-1013, 1015-1016, 1018-1019, 1021-1022, 1024-1025, 1027-1028, 1030-1031, 1033-1034, 1036-1037, 1039-1040, 1042-1043, 1045-1046, 1048-1049, 1051-1052, 1054-1055, 1057-1058, 1060-1061, 1063-1064, 1066-1067, 1069-1070, 1072-1073, 1075-1076, 1078-1079, 1081-1082, 1084-1085, 1087-1088, 1090-1091, 1093-1094, 1096-1097, 1099-1100, 1102-1103, 1105-1106, 1108-1109, 1111-1112, 1114-1115, 1117-1118, 1120-1121, 1123-1124, 1126-1127, 1129-1130, 1132-1133, 1135-1136, 1138-1139, 1141-1142, 1144-1145, 1147-1148, 1150-1151, 1153-1154, 1156-1157, 1159-1160, 1162-1163, 1165-1166, 1168-1169, 1171-1172, 1174-1175, 1177-1178, 1180-1181, 1183-1184, 1186-1187, 1189-1190, 1192-1193, 1195-1196, 1198-1199, 1201-1202, 1204-1205, 1207-1208, 1210-1211, 1213-1214, 1216-1217, 1219-1220, 1222-1223, 1225-1226, 1228-1229, 1231-1232, 1234-1235, 1237-1238, 1240-1241, 1243-1244, 1246-1247, 1249-1250, 1252-1253, 1255-1256, 1258-1259, 1261-1262, 1264-1265, 1267-1268, 1270-1271, 1273-1274, 1276-1277, 1279-1280, 1282-1283, 1285-1286, 1288-1289, 1291-1292, 1294-1295, 1297-1298, 1299-1300, 1302-1303, 1305-1306, 1308-1309, 1311-1312, 1314-1315, 1317-1318, 1320-1321, 1323-1324, 1326-1327, 1329-1330, 1332-1333, 1335-1336, 1338-1339, 1341-1342, 1344-1345, 1347-1348, 1350-1351, 1353-1354, 1356-1357, 1359-1360, 1362-1363, 1365-1366, 1368-1369, 1371-1372, 1374-1375, 1377-1378, 1380-1381, 1383-1384, 1386-1387, 1389-1390, 1392-1393, 1395-1396, 1398-1399, 1401-1402, 1404-1405, 1407-1408, 1410-1411, 1413-1414, 1416-1417, 1419-1420, 1422-1423, 1425-1426, 1428-1429, 1431-1432, 1434-1435, 1437-1438, 1440-1441, 1443-1444, 1446-1447, 1449-1450, 1452-1453, 1455-1456, 1458-1459, 1461-1462, 1464-1465, 1467-1468, 1470-1471, 1473-1474, 1476-1477, 1479-1480, 1482-1483, 1485-1486, 1488-1489, 1491-1492, 1494-1495, 1497-1498, 1499-1500, 1502-1503, 1505-1506, 1508-1509, 1511-1512, 1514-1515, 1517-1518, 1520-1521, 1523-1524, 1526-1527, 1529-1530, 1532-1533, 1535-1536, 1538-1539, 1541-1542, 1544-1545, 1547-1548, 1550-1551, 1553-1554, 1556-1557, 1559-1560, 1562-1563, 1565-1566, 1568-1569, 1571-1572, 1574-1575, 1577-1578, 1580-1581, 1583-1584, 1586-1587, 1589-1590, 1592-1593, 1595-1596, 1598-1599, 1601-1602, 1604-1605, 1607-1608, 1610-1611, 1613-1614, 1616-1617, 1619-1620, 1622-1623, 1625-1626, 1628-1629, 1631-1632, 1634-1635, 1637-1638, 1640-1641, 1643-1644, 1646-1647, 1649-1650, 1652-1653, 1655-1656, 1658-1659, 1661-1662, 1664-1665, 1667-1668, 1670-1671, 1673-1674, 1676-1677, 1679-1680, 1682-1683, 1685-1686, 1688-1689, 1691-1692, 1694-1695, 1697-1698, 1699-1700, 1702-1703, 1705-1706, 1708-1709, 1711-1712, 1714-1715, 1717-1718, 1720-1721, 1723-1724, 1726-1727, 1729-1730, 1732-1733, 1735-1736, 1738-1739, 1741-1742, 1744-1745, 1747-1748, 1750-1751, 1753-1754, 1756-1757, 1759-1760, 1762-1763, 1765-1766, 1768-1769, 1771-1772, 1774-1775, 1777-1778, 1780-1781, 1783-1784, 1786-1787, 1789-1790, 1792-1793, 1795-1796, 1798-1799, 1801-1802, 1804-1805, 1807-1808, 1810-1811, 1813-1814, 1816-1817, 1819-1820, 1822-1823, 1825-1826, 1828-1829, 1831-1832, 1834-1835, 1837-1838, 1840-1841, 1843-1844, 1846-1847, 1849-1850, 1852-1853, 1855-1856, 1858-1859, 1861-1862, 1864-1865, 1867-1868, 1870-1871, 1873-1874, 1876-1877, 1879-1880, 1882-1883, 1885-1886, 1888-1889, 1891-1892, 1894-1895, 1897-1898, 1899-1900, 1902-1903, 1905-1906, 1908-1909, 1911-1912, 1914-1915, 1917-1918, 1920-1921, 1923-1924, 1926-1927, 1929-1930, 1932-1933, 1935-1936, 1938-1939, 1941-1942, 1944-1945, 1947-1948, 1950-1951, 1953-1954, 1956-1957, 1959-1960, 1962-1963, 1965-1966, 1968-1969, 1971-1972, 1974-1975, 1977-1978, 1980-1981, 1983-1984, 1986-1987, 1989-1990, 1992-1993, 1995-1996, 1998-1999, 2001-2002, 2004-2005, 2007-2008, 2010-2011, 2013-2014, 2016-2017, 2019-2020, 2022-2023, 2025-2026, 2028-2029, 2031-2032, 2034-2035, 2037-2038, 2040-2041, 2043-2044, 2046-2047, 2049-2050, 2052-2053, 2055-2056, 2058-2059, 2061-2062, 2064-2065, 2067-2068, 2070-2071, 2073-2074, 2076-2077, 2079-2080, 2082-2083, 2085-2086, 2088-2089, 2091-2092, 2094-2095, 2097-2098, 2099-2100, 2102-2103, 2105-2106, 2108-2109, 2111-2112, 2114-2115, 2117-2118, 2120-2121, 2123-2124, 2126-2127, 2129-2130, 2132-2133, 2135-2136, 2138-2139, 2141-2142, 2144-2145, 2147-2148, 2150-2151, 2153-2154, 2156-2157, 2159-2160, 2162-2163, 2165-2166, 2168-2169, 2171-2172, 2174-2175, 2177-2178, 2180-2181, 2183-2184, 2186-2187, 2189-2190, 2192-2193, 2195-2196, 2198-2199, 2201-2202, 2204-2205, 2207-2208, 2210-2211, 2213-2214, 2216-2217, 2219-2220, 2222-2223, 2225-2226, 2228-2229, 2231-2232, 2234-2235, 2237-2238, 2240-2241, 2243-2244, 2246-2247, 2249-2250, 2252-2253, 2255-2256, 2258-2259, 2261-2262, 2264-2265, 2267-2268, 2270-2271, 2273-2274, 2276-2277, 2279-2280, 2282-2283, 2285-2286, 2288-2289, 2291-2292, 2294-2295, 2297-2298, 2299-2300, 2302-2303, 2305-2306, 2308-2309, 2311-2312, 2314-2315, 2317-2318, 2320-2321, 2323-2324, 2326-2327, 2329-2330, 2332-2333, 2335-2336, 2338-2339, 2341-2342, 2344-2345, 2347-2348, 2350-2351, 2353-2354, 2356-2357, 2359-2360, 2362-2363, 2365-2366, 2368-2369, 2371-2372, 2374-2375, 2377-2378, 2380-2381, 2383-2384, 2386-2387, 2389-2390, 2392-2393, 2395-2396, 2398-2399, 2401-2402, 2404-2405, 2407-2408, 2410-2411, 2413-2414, 2416-2417, 2419-2420, 2422-2423, 2425-2426, 2428-2429, 2431-2432, 2434-2435, 2437-2438, 2440-2441, 2443-2444, 2446-2447, 2449-2450, 2452-2453, 2455-2456, 2458-2459, 2461-2462, 2464-2465, 2467-2468, 2470-2471, 2473-2474, 2476-2477, 2479-2480, 2482-2483, 2485-2486, 2488-2489, 2491-2492, 2494-2495, 2497-2498, 2499-2500, 2502-2503, 2505-2506, 2508-2509, 2511-2512, 2514-2515, 2517-2518, 2520-2521, 2523-2524, 2526-2527, 2529-2530, 2532-2533, 2535-2536, 2538-2539, 2541-2542, 2544-2545, 2547-2548, 2550-2551, 2553-2554, 2556-2557, 2559-2560, 2562-2563, 2565-2566, 2568-2569, 2571-2572, 2574-2575, 2577-2578, 2580-2581, 2583-2584, 2586-2587, 2589-2590, 2592-2593, 2595-2596, 2598-2599, 2601-2602, 2604-2605, 2607-2608, 2610-2611, 2613-2614, 2616-2617, 2619-2620, 2622-2623, 2625-2626, 2628-2629, 2631-2632, 2634-2635, 2637-2638, 2640-2641, 2643-2644, 2646-2647, 2649-2650, 2652-2653, 2655-2656, 2658-2659, 2661-2662, 2664-2665, 2667-2668, 2670-2671, 2673-2674, 2676-2677, 2679-2680, 2682-2683, 2685-2686, 2688-2689, 2691-2692, 2694-2695, 2697-2698, 2699-2700, 2702-2703, 2705-2706, 2708-2709, 2711-2712, 2714-2715, 2717-2718, 2720-2721, 2723-2724, 2726-2727, 2729-2730, 2732-2733, 2735-2736, 2738-2739, 2741-2742, 2744-2745, 2747-2748, 2750-2751, 2753-2754, 2756-2757, 2759-2760, 2762-2763, 2765-2766, 2768-2769, 2771-2772, 2774-2775, 2777-2778, 2780-2781, 2783-2784, 2786-2787, 2789-2790, 2792-2793, 2795-2796, 2798-2799, 2801-2802, 2804-2805, 2807-2808, 2810-2811, 2813-2814, 2816-2817, 2819-2820, 2822-2823, 2825-2826, 2828-2829, 2831-2832, 2834-2835, 2837-2838, 2840-2841, 2843-2844, 2846-2847, 2849-2850, 2852-2853, 2855-2856, 2858-2859, 2861-2862, 2864-2865, 2867-2868, 2870-2871, 2873-2874, 2876-2877, 2879-2880, 2882-2883, 2885-2886, 2888-2889, 2891-2892, 2894-2895, 2897-2898, 2899-2900, 2902-2903, 2905-2906, 2908-2909, 2911-2912, 2914-2915, 2917-2918, 2920-2921, 2923-2924, 2926-2927, 2929-2930, 2932-2933, 2935-2936, 2938-2939, 2941-2942, 2944-2945, 2947-2948, 2950-2951, 2953-2954, 2956-2957, 2959-2960, 2962-2963, 2965-2966, 2968-2969, 2971-2972, 2974-2975, 2977-2978, 2980-2981, 2983-2984, 2986-2987, 2989-2990, 2992-2993, 2995-2996, 2998-2999, 3001-3002, 3004-3005, 3007-3008, 3010-3011, 3013-3014, 3016-3017, 3019-3020, 3022-3023, 3025-3026, 3028-3029, 3031-3032, 3034-3035, 3037-3038, 3040-3041, 3043-3044, 3046-3047, 3049-3050, 3052-3053, 3055-3056, 3058-3059, 3061-3062, 3064-3065, 3067-3068, 3070-3071, 3073-3074, 3076-3077, 3079-3080, 3082-3083, 3085-3086, 3088-3089, 3091-3092, 3094-3095, 3097-3098, 3099-3100, 3102-3103, 3105-3106, 3108-3109, 3111-3112, 3114-3115, 3117-3118, 3120-3121, 3123-3124, 3126-3127, 3129-3130, 3132-3133, 3135-3136, 3138-3139, 3141-3142, 3144-3145, 3147-3148, 3150-3151, 3153-3154, 3156-3157, 3159-3160, 3162-3163, 3165-3166, 3168-3169, 3171-3172, 3174-3175, 3177-3178, 3180-3181, 3183-3184, 3186-3187, 3189-3190, 3192-3193, 3195-3196, 3198-3199, 3201-3202, 3204-3205, 3207-3208, 3210-3211, 3213-3214, 3216-3217, 3219-3220, 3222-3223, 3225-3226, 3228-3229, 3231-3232, 3234-3235, 3237-3238, 3240-3241, 3243-3244, 3246-3247, 3249-3250, 3252-3253, 3255-3256, 3258-3259, 3261-3262, 3264-3265, 3267-3268, 3270-3271, 3273-3274, 3276-3277, 3279-3280, 3282-3283, 3285-3286, 3288-3289, 3291-3292, 3294-3295, 3297-3298, 3299-3300, 3302-3303, 3305-3306, 3308-3309, 3311-3312, 3314-3315, 3317-3318, 3320-3321, 3323-3324, 3326-3327, 3329-3330, 3332-3333, 3335-3336, 3338-3339, 3341-3342, 3344-3345, 3347-3348, 3350-3351, 3353-3354, 3356-3357, 3359-3360, 3362-3363, 3365-3366, 3368-3369, 3371-3372, 3374-3375, 3377-3378, 3380-3381, 3383-3384, 3386-3387, 3389-3390, 3392-3393, 3395-3396, 3398-3399, 3401-3402, 3404-3405, 3407-3408, 3410-3411, 3413-3414, 3416-3417, 3419-3420, 3422-3423, 3425-3426, 3428-3429, 3431-3432, 3434-3435, 3437-3438, 3440-3441, 3443-3444, 3446-3447, 3449-3450, 3452-3453, 3455-3456, 3458-3459, 3461-3462, 3464-3465, 3467-3468, 3470-3471, 3473-3474, 3476-3477, 3479-3480, 3482-3483, 3485-3486, 3488-3489, 3491-3492,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
:
UNITED STATES OF AMERICA ex rel. :
LOUIS WOLFISH, HELEN ROMERO, :
CHARMAINE ROBINSON, MARYANNE :
CALLAHAN, GERALDINE HARKER, :
FRANCIS WOODS, DANA DYNES, :
WILLIE S. McCARTHA, ESTELLA :
FERNANDEZ, MARGARET RUSSELL, :
RUTH SMITH, CYNTHIA EDWARDS, :
BIRCHEL L. CARSON, SHERMAN :
GREENE, MILDRED SKEETE, MARY :
JORDAN, DORRIS DORRIS, CARMEN :
ESTRADA, JEREMIAH O'SULLIVAN, :
MAXIMA VIDAL ORTIZ, ANTHONY :
VICTORY, JANET FALLEY, GORDON :
HAGEN, GARRY LEE, LINDA SESSOMS, :
et al., :

Petitioners, :

75 Civ. 6000 MEF

ORDER

-against-

THE HONORABLE EDWARD LEVI,
Attorney General of the United
States;

NORMAN CARLSON, Director, U.S.
Bureau of Prisons; and

LARRY TAYLOR, Warden, Metro-
politan Correctional Center,
et al.,

Respondents. :
-----X

The petitioner class, consisting of all persons who are or will be confined at the New York Metropolitan Correctional Center, 150 Park Row, New York, New York, 10007 having moved this Court for partial summary judgment on certain of the issues in this case, and the respondents have opposed summary judgment on certain of those issues and having cross-moved for summary judgment in their favor on other of those issues, and the Court having considered the affidavits, transcripts, exhibits and memoranda submitted by both sides and having heard oral presentations by counsel for both sides and having toured the Metropolitan Correctional Center at the request of respondents, and having

considered all of the other papers and proceedings heretofore had herein, and the Court, having issued an opinion dated January 5, 1977, constituting its conclusions; it is hereby

ORDERED that respondents, their agents, employees and successors and all persons acting in concert with them be and hereby are enjoined from confining any member of the petitioner class at MCC except under the following conditions:

1. SINGLE CELL OCCUPANCY

a. Within thirty days after the entry of this order, respondents shall eliminate all instances in which more than one person is housed at the same time in any one of the 389 residential rooms at MCC; thereafter, respondents shall not house more than one person in any one of those rooms at the same time;

b. If compliance with this Order requires that any member of the petitioner class be transferred out of MCC, respondents shall not transfer that petitioner or petitioners in an illegal or unconstitutional manner, or transfer him or them to housing which is itself illegal or unconstitutional; if respondents are unable to provide legal and constitutional transfers and housing for any petitioners who must be transferred to comply with this Order, then respondents shall not transfer any petitioners, but rather shall release on their own recognizance the persons held in default of the lowest amount of bail, and among persons held in the same amount of bail, the ones who have been confined for the longest time.

2. RECEIPT OF BOOKS, PERIODICALS AND OTHER READING MATERIAL

a. Respondents henceforth shall deliver to petitioners any books, periodicals or other reading material which have been sent directly from publishers or book clubs and any such materials which are mailed to petitioners from any other sources, including family and friends, or which are hand-delivered to an official at the institution designated by respondents to receive such materials.

b. Respondents may inspect such materials for contraband before delivering them to petitioners; provided that respondents shall not refuse to deliver any books, periodicals or other reading material to petitioners because of the literary or pictorial content, physical construction, or the method of its delivery to the institution, unless

(1.) such refusal is made pursuant to a regulation which has been expressly approved by this Court,

(2.) petitioner-addressee is advised in writing of the refusal to deliver and afforded reasonable procedures by which to contest that refusal, and

(3.) if the refusal to deliver is upheld, the material is returned to the sender.

3. RECEIPTS FOR THE SEIZURE OF ITEMS

Petitioners shall be provided with a written receipt for any item which is seized as contraband or for any other reason: said receipt shall identify the petitioner; the item seized; the date, time and location of the seizure; the prison official who effectuated the seizure; and the reason for the seizure.

4. MAIL

a. Incoming Mail

(1.) Respondents may open incoming mail to petitioners from attorneys; the courts; members of Congress; the President of the United States; officials of any United States agency or department; all State officials, including the Governors, members of State legislatures, and officials of any State agencies or departments; and members and employees of probation and parole boards (hereinafter referred to as "legal" mail) only to inspect said mail for contraband, and then only in the presence of the petitioner-addressee; respondents may not read the contents of any incoming "legal" mail for any reason.

(2.) Respondents may open incoming non-"legal" mail to petitioners out of their presence to inspect said mail for

contraband; respondents may not read incoming non-"legal" mail except upon a showing of good cause approved in each instance in advance in writing by the warden, and then only in the presence of the petitioner-sender.

b. Outgoing Mail

(1.) Petitioners may seal all outgoing "legal" mail before depositing it in the mailbox in their housing unit; respondents shall not open or read any outgoing "legal" mail for any reason.

(2.) Petitioners may seal outgoing non-"legal" mail before placing it in the mailbox in their housing unit; respondents may inspect outgoing non-"legal" mail by electronic or other devices to detect hidden objects, but without opening the letters; respondents may open outgoing non-"legal" mail and read its contents only upon a showing of good cause approved in each instance in advance in writing by the warden, and then only in the presence of petitioner-sender.

c. Respondents shall, within ten days of the entry of this Order, submit for this Court's approval a description of the procedures to be employed to insure compliance with the provisions of this section, particularly those provisions relating to the reading of mail, and the sanctions to be imposed for violation of those provisions.

And it is further

ORDERED, that petitioners' motion for partial summary judgment and respondents' cross-motion for partial summary judgment is in all other respects denied.

Dated: New York, New York
January , 1977

United States District Judge

A 3043

January 13, 1977

01-1074

Honorable Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: United States ex rel. Wolfish v. Levi
75 Civ. 6000 (MEF)

Dear Judge Frankel:

Pursuant to your opinion filed on January 5, 1977 in the above-captioned case, we are writing to respond to the proposed order submitted by relators' counsel and served on us on January 10, 1977. The following are our objections and recommended changes to the proposed order.

1.a. For purposes of clarity, we suggest that following the words "any one of the 389 residential rooms at MCC", the order should state "(i.e. exclusive of the dormitory unit on 11 South)." In addition, we request that respondents be allowed 60 days to comply with the Court's ban on double-celling. The reason for this is that we anticipate that within 60 days, the sentences of a sufficient number of cadre will expire to permit compliance with the ban with only a minimal amount (if any) of inmate transfers out of MCC for that purpose.

1.b. We strongly object to the inclusion of this paragraph in any form and urge that it be omitted in its entirety. First, the Court has not decided any issue relating to manner of transfers, and there is no evidence in the record that respondents have ever transferred inmates in an illegal or unconstitutional manner. Thus, any language regarding the manner of transfers is confusing, unnecessary, and beyond the scope of the Court's decision. Second, that decision pertains to the constitutionality of housing conditions at MCC; no other federal institutions were considered, and it is inappropriate for this Court to include in its order requirements for the

Hon. Marvin E. Frankel -2-

January 13, 1977

housing of MCC transferencees in other institutions. This is especially so because all such other institutions are located outside of this district and respondents' policies with respect to them are beyond the jurisdiction of this Court and because inmates, once they leave MCC, are no longer members of relators' class which is defined as consisting of all present and future (but not past) inmates of MCC. We recognize that Judge Lasker took a different approach in Wheeler v. Malcolm, 389 F. Supp. 964 (S.D.N.Y. 1975). However, in addition to the factors just noted, that case is distinguishable in that the constitutional standards set there were general in nature, and, unlike the question of double-celling, did not depend on findings of fact specific to each institution. Third, this Court should reject the suggestion that if the unspecified and unwarranted standards for transfers and transference housing are not met, certain pretrial detainees should be released on their own recognizance. Your Honor's authority to release prisoners whose bail has been set and whose case will be heard by other judges in this district (or others) is open to doubt. Moreover, there are surely less drastic means of reducing the inmate population. As noted above, it may not be necessary to transfer any inmates to comply with the Court's decision, and if transfers are necessary, we anticipate that they will involve sentenced inmates rather than pretrial detainees. We therefore believe that it is unnecessary for the order to deal with this matter at this time.

2.a. We recommend that this paragraph be redrafted in the negative, i.e.

Respondents shall not exclude for delivery to a relator any books, periodicals or other reading material on the ground that such books, periodicals or other reading material do not come directly from publishers or book clubs.

The reason for this is that the Court's decision dealt only with the issue of excluding reading materials because of their source. It did not touch upon any of the other aspects of respondents' policies relating to that subject. See Policy Statement 7300.4C. It is therefore inappropriate to phrase the order in such a way as to impose an affirmative duty upon respondents to deliver all printed matter to relators.

2.b. For the same reason, all of this paragraph beginning with "provided that" in line 2 should be deleted. There was absolutely nothing in the summary judgment motions or the Court's opinion dealing with the matters contained in that portion of relators' proposed order. In addition, we suggest that the first sentence (ending on line 2 with a semicolon) be followed by the following:

Such inspection may include the removal of the covers of such materials, and said materials may be delivered to the relators without their covers even if no contraband is found.

3. We recommend that this paragraph be changed to read as follows:

Respondents shall provide to the relator from whom an item of property not belonging to the MCC which is seized as contraband or for any other reason, a copy of a receipt therefor. The original of the receipt shall be signed by the relator from whom the item has been seized and shall be kept by respondents until the property has been returned to the relator, mailed to his home, confiscated and destroyed, or otherwise disposed of according to Bureau of Prison policies and subject to further order of this Court. Said receipts shall identify the relator claiming ownership of the item, the item seized, the date, time, and location of the seizure, the MCC official who effectuated the seizure, and the reason for the seizure. Where property is seized in a common area or in an area of the dormitory where the owner is not apparent, no receipt need be given if, after reasonable efforts, officials at MCC are unable to find the owner or a claimant to said property.

January 13, 1977

The purpose of the changes suggested above are self-evident: to obviate the duty to give receipts for property belonging to MCC as to which relators have no proprietary right and for property whose owner cannot be determined. In addition, to avoid later disputes, the owner of or claimant to the property must sign the original of the receipt which is then kept by the institution.

4.a. This paragraph should be replaced by the following:

So much of the amended petition which seeks an order enjoining respondents from opening and inspecting mail from attorneys and the courts except upon a showing of good cause is hereby dismissed with prejudice.

Since this was the only issue concerning "legal" mail which the Court decided, the order should deal only with it. Relators proposed order, instead, seeks to include respondents' current policies as part of the order. However, the legality of those policies was not in controversy, and their inclusion in an order is therefore inappropriate.

4.a.(2) Similarly, this paragraph should not include those policies concerning non-"legal" mail which were not in controversy. The only issues decided by the Court in its opinion were (1) the reading of incoming non-"legal" mail and (2) the opening of such mail out of the presence of the inmate addressee. With respect to the former issue, we suggest that the chief correctional supervisor, or an associate warden, as well as the warden, be authorized to make the required determination of good cause. In addition, to conform the order to the Court's opinion, respondents' return to the amended petition and the Sixth Amendment considerations underlying the distinction between "legal" and non-"legal" mail, the definition of non-"legal" mail should be mail from persons other than relators' attorneys or the Courts. This paragraph should therefore read as follows:

Respondents shall not read incoming mail from persons other than relators' attorneys or the courts except upon a showing of good cause approved in each instance in advance in writing by the chief correctional supervisor, an associate warden, or the warden, and then only in the presence of the relator-addressee. So much of the amended petition which seeks an order enjoining respondents from opening and inspecting mail from persons other than relators' attorneys or the courts except in the presence of the relator-addressee and upon a showing of good cause is hereby dismissed with prejudice.

4.b.(1). This paragraph should also be deleted, since there has never been any controversies relating to the opening, inspection, or reading of outgoing "legal" mail. Respondents policies do not permit it (see Policy Statement 2001.2B) and neither relators' motion for summary judgment nor the Court's opinion deals with it.

4.b.(2). For the reasons already discussed above, this paragraph should be modified so that non-"legal" mail is defined as mail from persons other than relators' attorneys and the Courts and that the chief correctional supervisor and the associate wardens, as well as the warden, be authorized to make the required finding of good cause. In addition, we suggest that this paragraph be changed so as to empower respondents to open, but not read, outgoing mail where the inspection of the envelope reveals the presence of objects other than the letter contained therein. This paragraph should therefore read as follows:

"Relators may seal outgoing mail to persons other than their attorneys or the Courts before placing it in the mailbox in their

Hon. Marvin E. Frankel

-6-

January 13, 1977

housing unit. Respondents may inspect such outgoing non-"legal" mail by electronic or other devices, or by manual examination, to detect the presence of objects other than the letter in the envelope. If such objects are detected, respondents may open the envelope to examine its contents. However, respondents may read outgoing non-"legal" mail only upon a showing of good cause approved in each instance in advance in writing by the chief correctional supervisor, an associate warden, or the warden, and then only in the presence of the relator-sender.

4.c. Respondents object to the inclusion of this paragraph. As the Court stated in its opinion, the Government is entitled to a presumption of official regularity. Respondents are committed to enforcement of the Court's order and will take the necessary steps to ensure that goal. We see no reason why, at the very outset, respondents should be compelled to submit a detailed description of the procedures to be employed to achieve compliance with respect to that part of the order dealing with the mail.

Respondents wish to request at this time that the Court include in its order a provision staying the implementation of the order for 15 days in order to permit the Solicitor General to consider the question of appeal, and to continue the stay pending a decision on appeal as to any portion of the order from which respondents file a notice of appeal on the condition that respondents seek an expedited appeal schedule. Certain aspects of this order, the abolition of double-celling and of the "publisher only" rule in particular, will require rather extensive administrative changes in the management of MCC. We believe that the burden of these changes upon respondents will outweigh the possible harm to relators of such a limited stay. Finally, given the complexity of these matters, we request that the Court schedule a conference after counsel for relators has filed a reply and before the Court enters an order.

Best Copy Available

Hon. Marvin E. Frankel

-7-

January 13, 1977

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney

By:

FREDERICK P. SCHAEFFER
Assistant United States Attorney
Tel.: (212) 791-1973

cc: Michael Young, Esq.
The Legal Aid Society
Criminal Appeals Bureau
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

A 3050

January 14, 1977

FFS:sic
75-3973
61-1086

BY HAND

Honorable Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: United States ex rel. Wolfish v.
Levi, 75 Civ. 6880 (HDP)

Dear Judge Frankel:

This letter refers to the submissions of the parties pending before Your Honor regarding the formulation and entry of an order on the summary judgment motion.

We request that the Court include in that portion of its order dealing with the double-bunking issue (subsection 1.a. of relator's submission) the following additional provision:

"... except that respondents are permitted to confine two individuals in one of the aforesaid residential rooms on the condition that (i) both such individuals have first executed a voluntary, written consent to be confined in a residential room with another individual, or (ii) there is an emergency situation, so certified by the Warden of the MCC, during which time it is necessary to temporarily confine two inmates in one of the aforesaid residential rooms."

We believe that such a provision is necessary and proper in this case in order to afford the respondents some flexibility to adequately provide housing accommodations

Best Copy Available

FPS:slc
75-2973
01-1086

A 3051

Hon. Marvin E. Frankel

-2-

January 14, 1977

in emergency situations, or when two or more individuals voluntarily consent to be housed in a double-bunked room. Moreover, provisions similar to those set forth above were part of the "single cell" judgment and order of the District Court (Judd, J.) in Detainees of Brooklyn House of Detention, etc. v. Malcolm entered on October 2, 1974 which was affirmed on appeal. Detainees of Brooklyn House of Detention, etc. v. Malcolm, 520 F.2d 392, 394 (2d Cir. 1975).

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney

By:

FREDERICK P. SCHAEFFER
Assistant United States Attorney
Telephone No.: (212) 791-1973

cc: Michael Young, Esq.
Legal Aid Society
Room 509
United States Courthouse
Foley Square
New York, New York 10007



A 3052
THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Federal Defender Services Unit
United States Court House
Foley Square — Room 509
New York, N. Y. 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER, Attorney-in-Charge

HAROLD H. HEALY, JR.
Chairman of the Board

ROBERT B. MCKAY
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Chief

WILLIAM E. HELLERSTEIN
Attorney-in-Charge
Criminal Appeals Bureau

January 17, 1977

The Honorable Marvin E. Frankel
United States District Judge
United States District Court
Southern District of New York
2002 United States Court House
Foley Square
New York, New York 10007

Re: WOLFISH v. LEVI, 75 Civ. 6000

Your Honor:

Pursuant to your January 5, 1977, opinion in this case, we are writing to respond to respondents' objections and recommended changes, set forth in their letters of January 13 and January 14, 1977, to the proposed order we submitted on January 10, 1977.

1.a. We have no objection to respondents' request as to the insertion of the phrase "i.e. exclusive of the dormitory unit on 11 South)."

The Sixty-Day Provision

The Government's request for sixty days after entry of this order to comply with the proscription on double-celling is unreasonable for several reasons. In its opinion of January 5, 1977, this Court expressly stated that "... some limited but reasonable time should be allowed to complete compliance, though action toward that end should begin immediately." (Id. at 24, emphasis added). Despite the directive that movement toward compliance "begin immediately," respondent Taylor, two days after the opinion was issued, declared that as of that date respondents had not even begun to make "plans" to transfer or shift the MCC population, let alone taken any affirmative action to begin reduction of the MCC population. (See article of The New York Times, Sunday, January 9, 1977, at 28, attached hereto as Exhibit A). In light of the

January 17, 1977

2

respondents' proclaimed failure to comply with this Court's directive on this matter, their request for additional time should be denied.

Since this order will in all likelihood not be signed until on or about January 20, 1977, petitioners' provision for compliance within thirty days of entry of the order will actually give the respondents forty-five days from this Court's decision of January 5, 1977, directing immediate commencement of action toward compliance. Petitioners submit that that amount of time complies with the "limited but reasonable time" called for by the Court in its decision. It must be remembered that the condition to be eliminated had been found to be unconstitutional in dimension and unpleasant in the extreme for those subjected to it. Prompt compliance is therefore mandatory.

Moreover, if we credit respondents' frequently repeated assertion that "... the length of confinement at MCC for both pretrial detainees and convicted persons is exceedingly short, averaging approximately thirty-six days" (Respondents' memo in opposition to partial summary judgment at 3), then the time provided in petitioners' proposed order should be more than ample to permit compliance without unnecessary transfers. Assuming a current population of 500 at MCC, respondents' calculations mean that approximately 300 of MCC's current population will depart from the institution during the forty-five days between this Court's January 5 decision and petitioners' proposed compliance date. Therefore, by merely limiting the inflow of new inmates, respondents can eliminate the 121 double-celled rooms without any unnecessary transfers whatsoever.

Finally, the respondents' asserted justification for this prolonged period for compliance -- that the sentences of a sufficient number of cadre will expire to permit compliance with a minimal number of transfers -- does not comport with the realities of this case. A majority of double-celling at MCC occurs in the pretrial and protective custody units of the institution. Because of constitutional and/or security reasons, neither pretrial nor protective custody inmates could be transferred to the rooms in the cadre unit left vacant by departing members of the cadre. Consequently, the estimated departure of the cadre members will have little if any effect on respondents' compliance with this order.

January 17, 1977

3

The Waiver Provision

Petitioners are adamantly opposed to inclusion of the provisions set forth in respondents' January 14, 1977, letter going to waiver and emergencies. Although waiver has its place in matters of jurisdiction and criminal proceedings, the suggestion that an individual can somehow voluntarily waive his right not to be subjected to environmental conditions found unconstitutional has been squarely rejected by the Supreme Court. Green v. County School Board of Kent County, Virginia, 391 U.S. 430 (1968). In Green, the Court, having previously found segregated educational systems unconstitutional, held that a "freedom of choice" plan under which black students could, in effect, waive their right to go to an integrated school, was unacceptable. Respondents' suggestion that petitioners be permitted to waive their right to constitutional housing is likewise invalid.

Moreover, although respondents include the word "voluntary" in their proposed provision, most, if not all, such waivers would inevitably be involuntary. Even if not expressly stated, it would be unmistakably implicit in every waiver respondents solicited from a petitioner that his failure to so waive would result in his transfer to another facility which was less desirable geographically or for other reasons (e.g., MCC San Diego, Marion Federal Penitentiary, Rikers Island). This Court cannot constitutionally authorize a procedure whereby a petitioner could be coerced into waiving his right to constitutional housing by the desire, for example, to remain close to his Manhattan-based family. Similarly, respondents' decision to transfer must be based on something more rational than the individual's unwillingness to be subjected to unconstitutional conditions.

Finally, given the nature of the Court's holding, an individual petitioner could not waive his right to constitutional housing without violating the constitutional rights of those around him. This Court, in proscribing double-celling at MCC, relied heavily on the onerous effects of that practice on conditions in the commons areas:

As units of formerly single rooms are doubled in occupancy, the multipurpose area for each overall unit displays oppressive consequences. Designed for use by the allotted number of single room

January 17, 1977

4

occupants, the multipurpose rooms become congested, noisy, unworkable for their intended uses. The recreational equipment, never excessive, is less sufficient. The eating tables are, obviously, less adequate.

Wolfish v. Levi, 75 Civ.
6000, opinion of January
5, 1977, at 7.

In fact, the overcrowding that accompanies double-celling adversely affects virtually every aspect of operations at MCC. Visiting is more crowded and/or more delayed. Medical services, library services, and educational services become strained. Staff becomes inadequate to meet the needs of the enlarged population. Thus, the waiver by some petitioners of their constitutional right to be singly housed would perpetuate these unconstitutional conditions for the other petitioners in their modular unit, as well as the entire MCC population. It is well established that an individual cannot validly waive another's constitutional rights. For these reasons, respondents' proposed waiver provision must be rejected.

The Emergency Provision

Respondents' second proposal in their January 14, 1977, letter -- that the warden be authorized to double-cell when he personally decides that an "emergency situation" exists -- is similarly unacceptable. If respondents anticipate unforeseen increases in MCC population, it is their obligation to keep the normal MCC population sufficiently below design capacity to enable them to accommodate unexpected arrivals under constitutional conditions. Moreover, since there are a large number of federal and state institutions within a few hours of MCC, and since MCC has its own bus, it is inconceivable that respondents would ever find themselves in a situation where they had to double-cell at MCC for any reason other than administrative convenience. There is more than enough authority for the proposition that administrative convenience will not justify constitutional deprivations like the double-celling for which respondents seek authorization by this provision.

If, despite these arguments, this Court believes that an "emergency" clause is needed, petitioners urge

January 17, 1977

5

the Court not to insert such a clause into the present order, but to refrain until the issue of dormitory housing and housing in the commons areas at MCC is litigated so that the Court may decide, in the context of all forms of housing at the institution whether an "emergency" provision is necessary and, if so, what form of "emergency" provision would be most appropriate.*

One final note is necessary on l.a. We assumed, when we drafted the proposed order, that once double-celling was eliminated at MCC, the bunk beds in the residential rooms, being no longer necessary, would be replaced by the more accommodating single beds that were

*It should be further noted that, contrary to respondents' assertion, the "emergency" provision they wish to insert is not "similar" to the order in Detainees (a/k/a Valvano). Rather, Judge Judd allowed double-celling in emergencies only when certified by the Commissioner of Corrections, and then only for a maximum of ten days. For the reasons set forth above, petitioners urge that such a provision not be included in the present order. However, the wording of respondents' proposal, which provides that an emergency could be certified by the warden of MCC and could last an undefined "temporary" period, is particularly offensive. Warden Taylor has persistently turned a deaf ear to petitioners' complaints as to overcrowding and double-celling. In his response to the pro se petition that commenced this lawsuit, he not only admitted that the population at MCC was then substantially greater than design capacity, but went on blithely to assert that he intended to allow the population to rise still further. (Affidavit of Larry Taylor dated December 10, 1975, at 1-2). He blamed this overcrowding primarily on "an increase in crime generally" (id. at 1), a condition he might well consider to constitute an "emergency" justifying double-celling under the provisions respondents propose. Moreover, during his one and one-half year tenure at MCC, Warden Taylor has permitted double-celling to increase to the point where, at the time of the summary judgment proceedings in this case, it infected substantially more than one-fourth of the rooms at MCC. Similarly, he has allowed the dormitory at MCC to become so overcrowded that it now houses twice the number of persons it was originally designed to house. Clearly, the warden would be a poor repository for the authority respondents seek to vest in him by this proposed provision.

January 17, 1977

6

originally there. Now, in light of respondents' numerous efforts to create exceptions under which double-celling would be permissible, we fear that this assumption may have been naive. We therefore request that the Court add a sentence to this section of the order providing that the bunk beds be removed from the residential rooms. Not only do they crowd the room and deprive the inmate of the storage drawers attached to the single beds, but they would present a constant temptation, perhaps to some future, lower echelon MCC staff member unaware of this Court's order, to house a second person in the second bunk.

1.b. Respondents' objections to this section of petitioners' proposed order are unreasonable. As respondents concede, the first part of this paragraph, prohibiting unconstitutional transfers, was employed by Judge Lasker in Rhem, based on the well-recognized principle that the Constitution protects people, not places.

Respondents must be prohibited from eliminating double-celling at MCC by, for example, transferring a petitioner in protective custody here to general population at Lewisburg where his life would be in jeopardy, or from transferring a pretrial detainee to MCC Chicago where he will be unable to consult with his lawyer in preparation for his trial. Moreover, respondents' apparent fear that this provision will produce substantial litigation is unfounded, since both parties are of the opinion that the elimination of double-celling should require few, if any, transfers.

Respondents also challenge the alternative "release in lieu of bail" provision of this paragraph. This provision was taken, virtually verbatim, from Judge Judd's order in Valvano. Respondents' expressed fear that this Court may not be empowered to provide for the release of persons unconstitutionally confined will be allayed by the Second Circuit's affirmance of Valvano:

We can, however, order the release of persons held under conditions which deprive them of rights guaranteed by the Constitution unless the conditions are corrected within a reasonable time.

Detainees of Brooklyn House
of Detention v. Malcolm, 520
F.2d 392, 399 (2d Cir. 1975).

January 17, 1977.

7

If such a release provision may be issued by a federal judge adjudicating a state institution, it is clearly even more proper and appropriate in this case.

2.a. and b. We urge the Court to adopt our wording for this section. First, since respondents are authorized under 2.b. to inspect and, under certain circumstances, refuse to deliver printed material to petitioners, this does not, as respondents assert, "impose an affirmative duty upon respondents to deliver all printed matter to relators." (Respondents' letter of January 13, 1977, at 2). Rather, it seeks to embody the concerns expressed by this Court in proscribing the publisher-only rule that petitioners' First Amendment rights be protected and the distinctions between affluent and other inmates be reduced, consonant with reasonable security needs.

If respondents' proposed wording were adopted, they could, consistent with that wording, formulate a variety of restrictions on the receipt of printed materials that would clearly frustrate the court's decision on this issue. Thus, for example, under respondents' proposed wording, they could refuse to deliver printed material to inmates because it was hand-delivered, rather than mailed. Indeed, given respondents' opposition to petitioners' proposed wording, they are clearly intent on imposing such a restriction. Forbidding hand delivery of printed material would serve only to perpetuate the very inequity between affluent and other inmates which the Court expressly sought to reduce by its ruling. An inmate whose family was too poor to afford the postage to mail a desired book would be precluded from hand-delivering it to an MCC official incident to visiting. Petitioners' wording would prevent such an inequity, as well as reduce the danger that a valued book would be lost in the mails.

Similarly, respondents could, without violating their proposed wording, issue new policy regulations prohibiting delivery to inmates of printed material that did not come directly from publishers, book clubs, or book stores, or prohibiting delivery of printed material that did not come directly from publishers, book clubs, or immediate family. Both such policies would clearly violate the intent of the Court's decision, and would be prevented by petitioners' proposed wording.

January 17, 1977

8

Petitioners' proposed wording of 2.b. was designed to permit reasonable security procedures without allowing respondents' rather broad definition of contraband (anything not authorized by the institution) to get in the way of allowing petitioners reasonable latitude in the manner in which they receive books and the nature of those books.

Finally, respondents' proposal that they be permitted to rip off and discard the covers of all printed materials, even if no contraband is found, is unnecessary and degrading. If it is to be included at all, it should be reworded as follows:

Such inspection may include the removal of the covers of such materials, upon a showing of good cause to believe that contraband is hidden therein certified in writing by the warden, and then only upon the consent of the inmate-addressee. Absent such consent, the reading material should be returned undamaged to the addressee.

Many of the books inmates wish to possess are expensive (e.g., law books) or of sentimental value (e.g., a family Bible). There can be no justification, and respondents have proffered none, for ripping off the covers of such books and discarding them without even a showing of good cause. Moreover, since the showing of good cause might be unfounded, and since it does not rise to the level of probable cause that would authorize such destruction in a criminal investigation, the book should be returned to the addressee undamaged unless the inmate consents to the destruction of the cover. Naturally, this clause would not prevent a search of a book cover by appropriate federal investigatory officials upon a showing of probable cause and compliance with appropriate investigatory procedures.

3. Petitioners have no objection to the last sentence of respondents' proposed wording of this section. In all other respects, petitioners request that the Court adopt petitioners' proposed wording for this section. Respondents' proposed requirement that petitioner sign a receipt, and by so doing admit possession of the seized item, is untenable. Since the receipt is for an item claimed to be contraband, the requirement that petitioner admit possession in order to get the receipt would be

January 17, 1977

9

violative of his Fifth Amendment rights. On the other hand, under respondents' formulation, if the petitioner refuses to sign, he is not given the receipt to which this Court has held he is constitutionally entitled. It is established law that an individual cannot be required to relinquish one constitutional right in order to gain the protections of another. See, e.g., United States v. Simmons, 390 U.S. 377 (1968). Consequently, the signature requirement is improper.

Second, respondents' provision to the effect that receipts need not be given for property belonging to MCC is unacceptable. An MCC official might seize an item because he believed it was MCC property. The very purpose of giving a receipt for such items would be to enable the inmate to contest whether the seized item was in fact MCC's or his own or whether, even if the property did belong to MCC, the inmate was properly in possession of it.

4.a. Petitioners respectfully request that the Court adopt petitioners' proposed wording. Petitioners' provision provides a clear and orderly statement of the Court's holdings on all aspects of mail delivery, as opposed to the dismembered and confusing nature of respondents' proposed wording. Respondents' principal objection -- that certain of the provisions in petitioners' wording are already in practice at MCC -- does not justify exclusion of those provisions. Indeed, the only possible reason respondents would object to the inclusion of provisions already in practice at MCC in this order would be to preserve their ability to alter those practices at some future time. Since alteration of those practices would clearly be violative of petitioners' rights as determined by this Court, petitioners' wording, embodying those practices, should be adopted.

Respondents also object to petitioners' definition of "legal" mail. That definition was set forth in petitioners' memorandum in support of the partial summary judgment motion at 36, and does not appear to have been expressly challenged by respondents. It is the definition of "legal" mail adopted in Gates v. Collier, 349 F.Supp. 881, 898 (N.D. Miss. 1972), affirmed, 501 F.2d 1291, 1310 (5th Cir. 1974). There is no more likelihood that a letter from the President or a member of Congress will contain contraband than a letter from an attorney or the court. Moreover, the First Amendment protects the prisoner's fundamental right to communicate with these persons as

January 17, 1977

zealously as the Sixth Amendment protects his access to his attorney and the courts. Consequently, petitioners' definition of "legal" mail should be adopted.

Petitioners likewise oppose respondents' suggestion that persons other than the warden be authorized to certify good cause. There are enough problems created by allowing the warden, whose paramount interests will clearly be those of security, to make the certification of good cause. To allow lesser officials to make the determination will result only in inconsistent standards and the obfuscation of accountability. Since respondents do not suggest, and there appears to be no reason to believe, that the good cause certification is likely to be called for with high frequency, there is no valid reason why the warden should not make this determination himself.

Respondents appear to be of the opinion that petitioners' wording does not authorize the opening of outgoing mail if contraband is suspected. To the contrary, however, petitioners' wording does authorize such opening, but only upon a showing of good cause to believe that the letter contains contraband, and only in the presence of the petitioner-sender. (See petitioners' proposed order, ¶4.b.(2)).

Petitioners submit that this wording is consistent with the intention, expressed in the Court's opinion, that inmates be assured that their outgoing mail will not be opened except in their presence when the need arises.

The Stay Provisions

Petitioners are opposed to the stay provisions requested in the last paragraph of respondents' letter of January 13, 1977. As to the request for time to allow the Solicitor General to make a decision as to appeal, we must note that the Court's opinion, while learned, is not lengthy. The Solicitor General has had ample time to read and digest its contents in the two weeks that have already transpired since the Court's opinion was filed. We are dealing here with conditions that are unconstitutional and oppressive to the petitioners. Compliance with the Court's order during any appeal or consideration of appeal will work considerably less of a hardship on fewer persons than would a stay. Moreover, none of the changes ordered by the Court are

A 3062

January 17, 1977

11

irreversible. In the unlikely event of reversal on appeal, it will be a simple matter for respondents to return to their old practices. We therefore strongly urge that the request for a stay not be granted.

Respectfully submitted,

MICHAEL YOUNG
Attorney for Petitioners

MYbc

cc: The Honorable Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Attention: Louis G. Corsi, Esq.

Judge Scores Placement of 2 Inmates in One-Man Cells of U.S. Jail

A Federal court judge has ruled that a new Federal prison that was hailed as a model of its kind when it opened here 17 months ago may not confine two inmates in one-man cells.

The judge, Marvin E. Frankel, handed down the decision last week in Federal District Court in Manhattan. In the 28-page ruling, he observed that the new 12-story Metropolitan Correctional Center in lower Manhattan was "designed and billed as a kind of modern showplace among jail facilities when it opened on Aug. 2, 1975."

The jail contains 389 rooms, or cells, designed for single occupancy.

"In late November 1975, however," Judge Frankel said, "as the population consigned to the Metropolitan Correctional Center grew at a rate evidently unanticipated at the opening so short a time before, it was decided that some rooms would be used to house two prisoners

each. As of the time of this decision, 121 of the rooms have now been designated for two inmates."

The practice of putting two inmates in cells designed for only one, which is known as double-celling, has been "universally condemned" by penological agencies, Judge Frankel said. He added that "fundamental denials of decency, privacy, personal security and, simply, civilized humanity" take place when two inmates are housed in such cells.

Inmates File a Suit

"It is enough to hold, and this court does," the judge ruled, "that the rooms before us do not rise to the level of possible acceptability for double occupancy."

The decision resulted from a suit filed by inmates of the new Federal jail, which was built back of the United States Court House at Foley Square. Lawyers for the Legal Aid Society were assigned to conduct the case for the inmates.

Judge Frankel also decided questions

about books, letters and the seizure of personal property, which were additional issues that the inmates raised in their complaint.

Focusing on a prison rule that forbids inmates to receive books and other written material from anyone on the outside except publishers and book clubs, the judge said that "the rule raises obvious questions of moment under the First Amendment." He rejected the contention of prison officials that the rule was justified as a security device and told them to do away with it.

The judge also overturned a prison rule that inmates must mail their letters without sealing them so that prison personnel could read them. Inmates can seal their letters, he said, but electronic devices may be used to detect any hidden objects.

Regarding searches of cells for contraband, Judge Frankel said that inmates were entitled to receipts for anything taken during a search by prison person-

nel. The judge said he would decide later whether inmates should be permitted to observe the searches.

The Metropolitan Correctional Center was built primarily as a detention center for defendants awaiting trial on Federal charges. But it also houses some state prisoners and others in protective custody, some convicted defendants who are serving sentences, and youthful offenders.

On a daily basis, the judge noted, inmates who are not defendants waiting for trials form about 40 to 60 percent of the jail's population.

Larry F. Taylor, warden of the correctional center, commenting on Judge Frankel's decision, said yesterday that it was "undergoing interpretation by our legal division."

"At this point," he said, "we have not made plans to transfer or shift our population or made any decision as to whether or not the order will be appealed. A decision on these matters will probably be made by the middle of next week."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	x
UNITED STATES OF AMERICA ex rel. LOUIS	:
WOLFISH, HELEN ROMERO, CHARMAINE ROBINSON,	:
MARYANNE CALLAHAN, GERALDINE HARKER,	:
FRANCIS WOODS, DANA DYNES, WILLIE S.	:
MCCARTHA, ESTELLA FERNANDEZ, MARGARET	:
RUSSELL, RUTH SMITH, CYNTHIA EDWARDS,	:
BIRCHEL L. CARSON, SHERMAN GREENE,	:
MILDRED SKEETE, MARY JORDAN, DORRIS	:
DORRS, CARMEN ESTRADA, JEREMIAH O'SULLIVAN,	:
MAXIMA VIDAL ORTIZ, ANTHONY VICTORY,	:
JANET FALLEY, GORDON HAGEN, GARRY LEE,	:
LINDA SESSOMS, et al.,	:
Petitioners,	: 75 Civ.6000
-against-	: ORDER
THE HONORABLE EDWARD LEVI,	:
Attorney General of the United States;	:
NORMAN CARLSON, Director, U.S. Bureau	:
of Prisons; and	:
LARRY TAYLOR, Warden, Metropolitan	:
Correctional Center, et al.,	:
Respondents.	:
-----	x

FRANKEL, D.J.

The petitioner class, consisting of all persons who are or will be confined at the New York Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York, 10007, having moved this court for partial summary judgment on certain of the issues in this case, and the respondents having opposed summary judgment on certain of those issues and having cross-moved for summary judgment in their favor on others of those issues, and the court having considered the affidavits, transcripts, exhibits, and memoranda submitted by both sides and having heard oral presentations by counsel for both sides and having

toured the MCC, and having considered all of the other papers and proceedings heretofore had herein, and the court having issued an opinion dated January 5, 1977; it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them be and they hereby are enjoined from confining any member of the petitioner class at MCC except under the following conditions:

1. SINGLE CELL OCCUPANCY

Within 60 days after the date of this order, respondents shall eliminate all instances in which more than one person is housed at the same time in any one of the 389 residential rooms at MCC (i.e., exclusive of the dormitory unit on 11 South); thereafter, respondents shall not house more than one person in any one of those rooms at the same time.

2. RECEIPT OF BOOKS, PERIODICALS AND
OTHER READING MATERIAL

a. Regardless of the source, respondents shall deliver to petitioners any books, periodicals, or other reading materials mailed or sent to petitioners or hand-delivered to an official at the institution designated by respondents to receive such materials.

b. Respondents may inspect such materials for contraband before delivering them to petitioners; provided that inspection shall be accomplished with the least possible damage to the reading material and that such damage shall be fully repaired, or repaired to the fullest extent possible, with maximum feasible speed unless contraband, duly and promptly determined to be contraband, has been detected therein.

3. RECEIPTS FOR THE SEIZURE OF ITEMS

Any petitioner from whom an item of property is seized shall be provided with a written receipt for such item; said receipt shall identify the petitioner; the item seized; the date, time, and location of the seizure; the prison official who effectuated the seizure; and the reason for the seizure.

4. MAIL

a. Respondents shall not read incoming mail from attorneys or courts in any circumstances, and may read incoming mail from persons other than attorneys or courts only upon a showing of good cause approved and determined in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden, and then only in the presence of the addressee.

b. Petitioners may seal all outgoing mail before placing it in a mailbox in their housing unit; respondents may inspect outgoing mail by electronic or other devices to detect hidden objects, but without opening the letters; upon detecting enclosed objects, or upon substantial cause for believing there are hidden objects in the envelope, respondents may open outgoing mail, other than mail to attorneys or courts, and examine the contents for contraband; respondents may read such outgoing mail so opened only upon a showing of good cause approved in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden, and then only in the presence of the petitioner-sender.

IT IS FURTHER ORDERED that so much of the amended

A 3067

petition as seeks an order enjoining respondents from opening and inspecting mail from persons other than petitioners' attorneys or the courts, except in the presence of the petitioner-addressee, and any incoming mail except upon a showing of good cause, is dismissed with prejudice; and that petitioners' motion for partial summary judgment and respondents' cross-motion for partial summary judgment are in all other respects denied.

Dated, New York, New York

January 19, 1977

MARVIN E. FRANKEL

United States District Judge



THE LEGAL AID SOCIETY

Criminal Appeals Bureau

Federal Defender Services Unit
United States Court House
Foley Square — Room 509
New York, N. Y. 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER, Attorney-in-Charge

HAROLD H. HEALY, JR.
Chairman of the Board

ROBERT B. MCKAY
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Chief

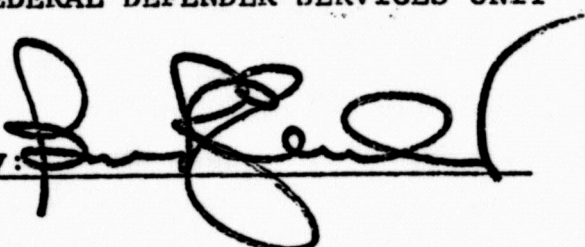
WILLIAM E. HELLERSTEIN
Attorney-in-Charge
Criminal Appeals Bureau

December 6, 1977

Re: WOLFISH v. LEVI, 77-2035, 2131

Received two copies of Volumes I-V of
the Joint Appendix in the above-captioned
case.

THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT

By: 



THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Federal Defender Services Unit
United States Court House
Foley Square — Room 509
New York, N. Y. 10007
(212) 732-2971

PHYLIS SKLOCT BAMBERGER, Attorney-in-Charge

HAROLD H. HEALY, JR.
Chairman of the Board
ROBERT B. MCKAY
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Chief

WILLIAM E. HELLERSTEIN
Attorney-in-Charge
Criminal Appeals Bureau

December 6, 1977

Re: WOLFISH v. LEVI, 77-2035, 2131

Received two copies of Volumes I-VII of
the Joint Appendix in the above-captioned
case.

THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT

By 